

No. 15828

United States
Court of Appeals
for the Ninth Circuit

WM. A. SMITH CONTRACTING CO., INC., a
corporation, and WM. A. SMITH CON-
TRACTING COMPANY OF CALIFORNIA,
a corporation, doing business as a joint ven-
ture under the name of Lookout Point Con-
structors, Appellants,
vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS and RACHEL CURTIS, a co-
partnership, doing business as Curtis Gravel
Company, Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

FEB 13 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Appellees.

In the District Court of the United States
for the District of Oregon

Civil No. 7852

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS, and RACHEL CURTIS, a co-
partnership, doing business as CURTIS
GRAVEL COMPANY, Plaintiffs,

vs.

WM. A. SMITH CONTRACTING CO. INC. of
Missouri, a corporation, and WM. A. SMITH
CONTRACTING COMPANY OF CALIFOR-
NIA, a corporation, doing business as a joint
venture under the name of LOOKOUT POINT
CONSTRUCTORS, Defendants.

PRE-TRIAL ORDER

This cause of action came on for pre-trial confer-
ence before the undersigned Judge of the above-
entitled Court. The plaintiffs appeared by their at-
torneys, Ramacciotti & Ratcliffe, and the defendants
appeared by their attorneys, Keane and Haessler.
The parties, with the approval of the Court, agreed
upon the following:

Agreed Facts

I.

That plaintiffs are citizens of the State of Wash-
ington.

II.

That Wm. A. Smith Contracting Co., Inc. of Mis-

souri is a corporation organized and existing under laws of Missouri. That Wm. A. Smith Contracting Co. of California is a corporation organized and existing under laws of California. That said corporations referred to were at all times referred to in pleadings joint adventurers doing business as Lookout Point Constructors.

III.

That on or about January 31, 1951, defendants entered into a prime contract with the United States of America. A copy of said contract with addenda, invitation for bids, etc., is attached to this Pre-Trial Order as Exhibit 1. It is stipulated between the parties that said Exhibit 1 constitutes the prime contract referred to herein.

IV.

That on or about June 10, 1951, the parties entered into an agreement of sub-contract, a copy of said sub-contract of June 10, 1951 is attached to this Pre-Trial Order as Exhibit 2. It is hereby stipulated between the parties that said Exhibit 2 is a true copy of the sub-contract between the parties.

V.

That a plat of location of Lookout Point Reservoir, attached to this Pre-Trial Order as Exhibit 3, is stipulated between the parties to be a plat of the said area.

VI.

That it is stipulated between the parties that pho-

tographs offered in evidence by either party will be deemed properly identified if they are identified as to the subject photographed without need for calling the person who actually handled the camera when the pictures were taken.

VII.

That the dealings between plaintiffs and defendants which were consummated in the sub-contract of June 10, 1951 began in March of 1951.

VIII.

That plaintiffs did, prior to December 15, 1951, procure, manufacture and stockpile fifty-eight thousand four hundred and thirty-four (58,434) cubic yards of ballast material.

IX.

That at the contract price of Two Dollars and Twenty Cents (\$2.20) per cubic yard, plaintiffs would have been entitled to ($\$2.20 \times 58,434$ cubic yards) One Hundred Twenty-Eight Thousand Five Hundred Fifty-Four Dollars and Eighty Cents (\$128,554.80).

X.

That defendants paid plaintiffs One Hundred Sixteen Thousand and Eight Hundred and Twelve Dollars and Three Cents (\$116,812.03) on account ballast leaving a difference of Eleven Thousand Seven Hundred Forty-Two Dollars and Seventy-Seven Cents (\$11,742.77) as claimed by plaintiffs.

XI.

That of the sum of \$11,742.77, \$9,872.70 represents the amount withheld by defendants from plaintiffs on account the claimed extra cost of procuring ballast from commercial sources, and the remaining portion of the said \$11,742.77 represents the cost of placing cars under the ballast loader in the stockpile area and certain small items.

XII.

That plaintiffs moved cars to the ballast loader until approximately the 19th day of April, 1952, and that the defendants moved cars to the said loader thereafter.

XIII.

That it is stipulated between the parties that if it is determined that the plaintiffs are entitled to payment for moving cars, they are entitled to the principal sum of \$1,961.81, and if it is determined that the defendants are entitled to payment for moving cars, they are entitled to the sum of \$1,874.88.

XIV.

That the breakdown on the item of \$9,872.70, as set out in preceding paragraph is as follows:

12,837.07 c.y. of ballast purchased at	
Springfield @ \$1.75 per c.y.....	\$22,464.87
Setting up crusher at Springfield...	136.94
Freight on 211 cars of ballast from	
Springfield to Jasper.....	13,146.18
Extra train hauls from Jasper to...	2,366.26
	<hr/>
Total Cost extra ballast.....	\$38,114.25

Less 12,837.07 c.y. @ 2.20..... (28,241.55)

Net \$ 9,872.70

XV.

That if the reporter present at the hearing had before the Claims and Appeals Board, U. S. Corps of Engineers, on May 10 and May 11, 1954 in Portland, Oregon, were called, said reporter would testify that the transcript of testimony thereof, listed on plaintiff's list of exhibits as #1, is a true and correct transcript and record of the questions propounded, the answers given thereto, the statements made by the parties designated as having made such statements, and of the proceeding had at said time and place. This stipulation is not intended in any manner to effect the admissibility of said transcript, and defendants expressly reserve their right to object to the admissibility thereof.

XVI.

That the following are authorized agents of plaintiffs, and had authority to bind plaintiffs by their action:

Marland Curtis, Rexford B. Stuart, D. E. Thompson.

That the following are authorized agents of defendants, and had authority to bind defendants by their action:

L. W. Huncke, Harry G. Moore, D. M. Salm, William Martin.

Plaintiffs' Contentions of Fact

I.

That defendants promised and agreed to furnish plaintiffs information as to the quantity of ballast required so as to enable plaintiffs to produce and stockpile said quantity by completion date set forth in the sub-contract agreement of these parties dated June 10, 1951.

II.

That plaintiffs did manufacture and stockpile ballast material in a quantity in excess of 4.3% of the quantity estimated in the prime contract referred to in the sub-contract of these parties.

III.

That defendants were fully advised as to the quantity of ballast stockpiled and as to plaintiffs' intention to dismantle their crushing plant, but that defendants' only objection to the dismantling thereof and the quantity of ballast produced was on the basis of a rejection of some of the ballast.

IV.

That none of the ballast stockpiled by plaintiff was rejected.

V.

That the custom and usage of the trade require that defendants advise plaintiffs of the quantity of ballast required.

VI.

That the sub-contract of these parties provides

for a definite completion date of plaintiffs' crushing activities.

VII.

That after plaintiffs' crushing plant had been dismantled, defendants entered into an agreement, secret as to plaintiffs, with the railroad and the U. S. Corps of Engineers, requiring the use of approximately 9,000 additional cubic yards of ballast material. That said additional ballast was not set forth or contemplated in either the prime contract or the sub-contract of these parties.

VIII.

That defendants, on their own behalf, filed a claim with the U. S. Corps of Engineers for reimbursement on account the additional cost of procuring ballast material, said additional cost representing the same sum that defendants withheld from plaintiffs.

IX.

That the U. S. Corps of Engineers has approved and authorized payment of the sum of \$1,845.65 on account the extra cost incurred by defendants in procuring additional ballast.

X.

That the town of Jasper, Oregon, is on "the Southern Pacific relocated main line" as referred to in the sub-contract of these parties.

XI.

That the custom and usage of the trade required defendants to move railroad cars for loading.

XII.

That defendants refused to compensate plaintiffs for their expenses in moving railroad cars for loading and plaintiffs thereupon withdrew from such activity.

XIII.

That plaintiffs incurred expenses in the sum of \$1,961.81 in moving railroad cars for loading.

XIV.

That on and before September 25, 1952, plaintiffs made demand on defendants for payment of the sum of \$17,085.28, representing the reasonable value of labor, equipment and services furnished by plaintiffs to defendants outside the scope of the sub-contract of these parties, said claim being composed of:

Standby Equipment	\$12,959.51
Cleaning Culvert	123.40
Ballast Loading—Standby Equipment	1,500.00
Excavating Sub-Grade and Reshaping	2,502.36

XV.

That defendants agreed to and did submit plaintiffs' claim in said sum of \$17,085.28 to the U. S. Corps of Engineers on behalf of plaintiffs.

XVI.

That on April 1, 1953, the U. S. Corps of Engineers allowed and paid to defendants the sum of

\$14,582.92, which sum represented the claims submitted on behalf of plaintiffs on account:

Standby Equipment	\$12,959.52
Cleaning Culvert	123.40
Ballast Loading Standby Equipment	1,500.00

XVII.

That all the equipment, labor and services for which defendant received the sum of \$14,582.92 were furnished by plaintiffs.

XVIII.

That defendants have at all times prior to October, 1955, acknowledged plaintiffs' right to said sum of \$14,582.92.

XIX.

That the quantity of ballast manufactured by plaintiffs, to wit: 58,434 cubic yards, for defendant, and the estimated quantity as stated in the subcontract, to wit: 56,000 cubic yards, were determined by measurement in the hauling vehicle at the point of delivery.

XX.

That defendants submitted its claim to the U. S. Corps of Engineers on account additional cost of procuring ballast material as its own claim and not on behalf of plaintiffs.

XXI.

That defendants failed to commence ballasting

prior to plaintiffs' removal of crushing plant although four and one-half miles of completed sub-grade were available.

XXII.

That defendants procured permission from the U. S. Corps of Engineers without advice or notice to plaintiffs, to delay ballasting operations until April, 1952, although, if ballasting operations had been commenced as per defendants' prime contract, the total requirements for completion of the work could have been accurately estimated.

XXIII.

That the sub-contract of these parties, providing for the furnishing of all required ballast and further providing that the ballast shall be stockpiled by a date certain, is ambiguous.

Defendants' Contentions of Fact

I.

That plaintiffs agreed to furnish ballast and road topping material to defendants in accordance with the terms of a sub-contract entered into by and between the parties on June 10, 1951.

II.

That in order to provide agreed ballast and road topping material, plaintiffs erected a rock crushing plant and stockpile at Dexter, Oregon. Said location was designated as "Borrow Area 'B'" and was an approved area under the general contract between defendants and the United States, although

plaintiffs were not obliged to use the site, and did so on their own option.

III.

That plaintiffs removed their rock crushing plant from Borrow Area "B" before the job was completed, and before sufficient ballast and road topping had been manufactured to supply the needs of the job.

IV.

That plaintiffs removed its plant in order to amass additional profits from another job which was independent of its sub-contract with defendants.

V.

That plaintiffs removed their plant without permission from defendants, and without obtaining permission from the Contracting Officer of the U. S. Army Engineers.

VI.

That defendants strenuously warned plaintiffs that the latter would be held responsible for any costs resulting from the early removal of the rock crushing plant.

VII.

That plaintiffs knew that the estimated quantities referred to in the prime contract and sub-contract were merely estimates, and that plaintiffs were obligated to deliver all gravel required under the terms of the job.

VIII.

That the amount of ballast and road topping re-

quired on the job cannot be accurately estimated in advance because material delivered pursuant to the contract is measured in "loose fill" in cars, while ballast distributed on the right of way is "compacted fill", and the amount of loose fill which settles into a cubic yard of compacted fill is indeterminate and varies with conditions of crushing, loading, and application.

IX.

That plaintiffs failed to provide all of the materials required to complete the agreed job.

X.

That because of plaintiffs' failure, defendants were forced to procure 12,837.00 yards of ballast material from commercial sources at a price of \$.769 per cubic yard in excess of the sub-contract price, and to transport same resulting in a total cost of \$9,872.70.

XI.

That because of plaintiffs' failure to provide agreed ballast, defendants were forced to incur direct labor expenses in the sum of \$460.00 and indirect costs in the sum of \$1,168.00.

XII.

That prior to plaintiffs' removal of its rock crushing equipment from Borrow Area "B", both plaintiffs and defendants interpreted the sub-contract as requiring plaintiffs to place cars for loading.

XIII.

That under industry custom and usage, plaintiffs were obligated to move cars in place for loading.

XIV.

That the method of loading the cars was under plaintiffs' control.

XV.

That plaintiffs placed cars for loading of ballast without claiming compensation therefor until after removal of its rock crushing equipment.

XVI.

That on April 18, 1952, plaintiffs withdrew their car moving equipment, and refused to load any more cars, so that defendants were compelled to move cars for loading, and incurred costs hereinbefore stipulated.

XVII.

That any delays in the estimated progress of the work contemplated under the prime contract and sub-contract were at the instance of the United States government and were not occasioned by any neglect or failure on the part of defendants.

XVIII.

That the completion dates set forth in the prime contract and sub-contract were for the benefit of the United States government and could and were in fact waived by the United States.

XIX.

That both plaintiffs and defendants were obli-

gated to complete the agreed job without regard to the completion dates set forth in the contract for the benefit of the United States of America.

XX.

That plaintiffs have never furnished defendants with the Release required under the terms of the prime contract and sub-contract.

Plaintiffs' Contentions of Law

I.

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention in the interpretation of the language of the contract.

II.

Parties who contract on subject matter concerning which known usages prevail by implication incorporated them into their agreements, and usages and customs may qualify the meaning of a contract otherwise ambiguous, add incidents not in contradiction of the fundamental provisions of the contract, and supply omissions under certain circumstances which have occurred in the agreement of the parties.

III.

Surrounding circumstances existing at the time a contract is entered into must be examined for an interpretation of the intent of the parties.

IV.

The interpretation given a contract by the parties

themselves is to be accorded great, if not controlling, weight in understanding their intention at the time of execution of the agreement.

V.

Where the parties to a special contract deviate from the original plan agreed upon and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as a work wholly extra, outside the scope of the contract, and may be recovered for as such. A contractor may recover the reasonable value of additional work necessitated by a material change of specifications.

VI.

If the failure of one party to fulfill the terms of its contract is attributable to or caused by the breach of contract or duty of the other party, the former party has a right of action on the contract notwithstanding such nonperformance.

VII.

That a party invoking a remedy appropriate to a certain state of facts thereby elects his remedy and cannot thereafter invoke a remedy appropriate to an inconsistent state of facts.

VIII.

Whenever a debtor is in default for not paying money in pursuance of his contract, the creditor is

entitled to indemnity in a sum of not less than the specified amount of money with interest from the time of the default until the obligation is discharged. Interest on money runs from the time when the money becomes due and payable.

Defendants' Contentions of Law

I.

That plaintiffs committed a partial breach of the sub-contract by withdrawing crushing equipment from Borrow Area "B".

II.

That plaintiffs committed a partial breach of the sub-contract by failing to provide the gravel necessary for the job.

III.

That defendants were entitled to damages resulting from plaintiffs' partial breach of the sub-contract.

IV.

That it was proper for defendants to attempt to mitigate the damages resulting from plaintiffs' partial breach of the sub-contract.

V.

That the rights of both parties are covered by the terms of said sub-contract.

VI.

That plaintiffs were obligated to furnish defendants with a Release as a condition precedent to any final payment under the sub-contract.

VII.

That neither party is entitled to interest on sums claimed from the other one because the respective rights and obligations of the parties are contested and are indefinite and uncertain.

Stipulation Regarding Exhibits

1. Plaintiffs' list of exhibits and Defendants' list of exhibits are appended to this Pre-Trial Order and incorporated herein by reference.

2. It is hereby stipulated and agreed between the parties that copies of documents and correspondence may be received in evidence in lieu of the original document, and that all exhibits listed and appended hereto may be received without objection as to identification; provided, however, that both parties reserve the right to object otherwise to the relevancy or competency of any exhibit.

Signature.

This Pre-Trial Order having been agreed upon and submitted by counsel for both parties on this 30th day of January, 1956, is hereby accepted by both parties and the Court.

/s/ WILLIAM G. EAST,
United States District Judge.

KEANE AND HAESSLER,
/s/ ERIC R. HAESSLER.

/s/ ROBERT E. RATCLIFFE for
RAMACCIOTTI AND
RATCLIFFE,

/s/ ROBERT E. RATCLIFFE.

Plaintiffs' List of Exhibits

1. Transcript of Testimony given at Hearing before U. S. Corps of Engineers, Claims and Appeals Board, on May 10 and May 11, 1954.

2. Letters:

A. Date: 9/14/51. From Curtis Gravel Co., to W. A. Smith Contracting Co.;

B. Date: 9/21/51. From Lookout Point Construc., to Curtis Gravel Co.;

C. Date: 11/24/51. From Curtis Gravel Co., to Lookout Point Constructors;

D. Date: 3/14/52. From W. A. Smith Contr. Co., to Curtis Gravel Co.;

E. Date: 4/5/52. From Curtis Gravel Co., to Lookout Point Constructors;

F. Date: 4/14/52. From Lookout Point Constr., to Curtis Gravel Co.;

G. Date: 9/25/52. From Lookout Point Constr., to Corps of Engineers;

H. Date: 1/19/53. From Lookout Point Constr., to Corps of Engineers;

I. Date: 2/23/53. From Lookout Point Constr., to Corps of Engineers;

J. Date: 3/16/53. From Lookout Point Constr., to Corps of Engineers;

K. Date: 6/29/53. From Lookout Point Constr., to Corps of Engineers.

3. Vicinity Map, Lookout Point Reservoir, prepared by U. S. Corps of Engineers.

4. U. S. Corps of Engineers' Change Order #23.

Defendants' List of Exhibits

1. General Contract between Lookout Point Constructors and the United States of America, together with invitation for bids, specifications and price list, etc., dated January 31, 1951.

2. Subcontract between Lookout and Curtis dated 6/10/51.

3. Plat of area prepared by U. S. Engineers.

4. Letters:

a. Date: 9/12/51. From Lookout Point Constructors, to Curtis Gravel Co.;

b. Date: 9/17/51. From Lookout Point Constructors, to Curtis-Gravel Co.;

c. Date: 9/25/51. From Curtis Gravel Co., to Wm. A. Smith;

d. Date: 11/16/51. From D. Salm, to L. W. Huncke;

e. Date: 11/24/51. Curtis Gravel Co., to Lookout Point Constructors;

f. Date: 12/3/51. From Lookout Point Constructors, to Curtis Gravel Co.;

g. Date: 11/26/51. From L. W. Huncke, to W. A. Martin;

h. Date: 12/5/51. From D. Salm, to L. W. Huncke;

i. Date: 2/4/52. Curtis Gravel Co., to Lookout Point Constructors;

j. Date: 2/26/52. From Lookout Point Constructors, to Curtis Gravel Co.;

k. Date: 3/14/52. From Wm. A. Smith, to Curtis Gravel Co.;

l. Date: 3/29/52. From Lookout Point Constructors, to Curtis Gravel Co.;

m. Date: 4/5/52. From Curtis Gravel Co., to Lookout Point Constructors;

n. Date: 4/14/52. From Lookout Point Constructors, to Curtis Gravel Co.;

o. Date: 5/8/52. From Lookout Point Constructors, to Curtis Gravel Co.

5. Telegrams:

a. Date: 5/9/52. From Wm. A. Smith Co., to Curtis Gravel Co.;

b. Date: 5/13/52. From Lookout Point Constructors, to Curtis Gravel Co.

6. Invoice:

Date: 6/16/52. From Lookout Point Constructors, to Curtis Gravel Co.

7. Letters:

a. Date: 5/16/52. From Lookout Point Constructors, to Curtis Gravel Co.;

b. Date: 4/16/52. From D. Salm, to L. W. Huncke;

c. Date: 4/30/52. From D. Salm, to L. W. Huncke;

d. Date: 9/26/52. From Curtis Gravel Co., to Wm. A. Smith Co.;

e. Date: 9/26/52. From Ramacciotti & Ratcliffe, to Lookout Point Constructors;

f. Date: 9/26/52. From D. M. Salm, to L. W. Huncke;

g. Date: 12/5/52. From Lookout Point Constructors, to Ramacciotti & Ratcliffe;

h. Date: 1/19/53. From Lookout Point Constructors, to Corps of Engineers;

i. Date: 1/26/53. From Corps of Engineers, to Corps of Engineers;

j. Date: 10/14/51. From D. Salm, to L. W. Huncke;

k. Date: 9/14/51. From Curtis Gravel Co., to Wm. A. Smith Co.

[Endorsed]: Filed Jan. 30, 1956.

[Title of District Court and Cause.]

MEMORANDUM OPINION

East—Judge.

Having considered the evidence adduced by the parties, respectively, and the briefs submitted by counsel, the Court is of the opinion:

1. That the defendants, as prime contractors, failed to furnish the plaintiff with a final quantity requirement so that the plaintiff could reasonably supply the required stockpile of ballast material from their arranged sources within the time contemplated by the sub-contract and the understand-

ing of the parties, and that plaintiff fully performed that part of its contract to be performed on its part as to quantity of ballast material to be furnished.

The defendant has no legal or equitable right to withhold payment to plaintiff of the sum of \$9,872.70 on the alleged ground of additional cost of securing ballast material upon alleged default on the part of plaintiff, in that the purchase of ballast material by the defendant from commercial sources was without fault or negligence on the part of the plaintiff.

Therefore, plaintiff is entitled to recover from the defendant the amount of \$11,742.77, less the amount of \$1,874.88, or the resulting sum of \$9,867.87, together with interest thereon at the rate of six per cent per annum from the date of the last payment made by the defendant to plaintiff upon the contract.

As to the allowance of interest, see *Public Market Co., vs. City of Portland*, 171 Ore. 522, at page 625.

2. That the plaintiff was obligated to move the cars for loading of ballast material and is not entitled to reimbursement therefor, and that defendant is entitled to withhold as an offset from amounts due the plaintiff the stipulated sum of \$1,874.88, on account of expense of moving cars as aforesaid.

3. That the defendant, in connection with its presenting and prosecution of its claim against the Corps of Engineers under Change Order No. 23,

Supplement 1, was acting for and on behalf of the plaintiff. That the defendant is entitled to have and receive a sum equal to five per cent of the award for administrative costs and expense and an additional sum equal to one per cent, bond expense. Therefore, plaintiff is entitled to have and recover of and from the defendant the sum of \$14,582.92 less six per cent thereof, to be retained by the defendant, together with interest on the resulting balance at the rate of six per cent per annum from April 1, 1953, the date of payment to the defendant by the Corps of Engineers, until paid.

Counsel for the plaintiff is requested to submit proposed Findings of Fact, Conclusions of Law and Judgment in conformity with the foregoing and counsel for the defendant are allowed ten (10) days from date of receipt within which to file their objections if any to said proposed Findings.

Dated, March 4, 1957.

[Endorsed]: Filed March 4, 1957.

[Title of District Court and Cause.]

FINDING OF FACT AND CONCLUSIONS
OF LAW

The above entitled action came on regularly for trial on the 30th day of January, 1956, before the Honorable William G. East, Judge, a jury having been expressly waived by the parties. The plaintiffs appeared by Albert L. Ramacciotti and Rob-

ert E. Ratcliffe, their attorneys, and personally by Marland Curtis; and the defendants appeared by Gordon H. Keane and Eric G. Haessler, their attorneys. The Pre-Trial Order, approved by the parties through their respective attorneys of record, was signed and entered of record. Evidence of plaintiffs and defendants was heard and received, after which both parties rested. Oral arguments were waived, and written arguments were submitted by the attorneys of record for the parties herein. The matter was taken under advisement by the Court, and thereafter the Court rendered its decision and in accordance therewith the Court hereby makes and enters the following:

Findings of Fact

I.

The plaintiffs are citizens and residents of the State of Washington; the defendant Wm. A. Smith Contracting Co., Inc., of Missouri, is a Missouri corporation; the defendant Wm. A. Smith Contracting Company of California is a California corporation; and the matter and amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

II.

The defendants were, at all times pertinent hereto, engaged as joint adventurers under the name and style of Lookout Point Constructors.

III.

That on the 10th day of June, 1951, the parties

hereto entered into an agreement of sub-contract, the terms of which required, in part, that plaintiffs stockpile a quantity of ballast material estimated to be 56,000 cubic yards.

IV.

That it was the intention, agreement and understanding of these parties that defendants furnish plaintiffs with information as to final quantity requirements of ballast material so that plaintiffs could reasonably supply the required stockpile of ballast material within the time contemplated by the sub-contract agreement aforesaid.

V.

That defendants failed to furnish plaintiffs with information as to final quantity requirements of ballast material within the time contemplated by the sub-contract agreement.

VI.

Plaintiffs stockpiled 58,434 cubic yards of ballast material by December 15, 1951, and were entitled to payment therefor in the sum of \$128,554.80. Defendants paid to plaintiffs for said ballast material \$116,812.03, and retained the balance, to-wit: \$11,742.77.

VII.

The sum of \$11,742.77 retained by defendants as aforesaid represented defendants' alleged additional cost of procuring ballast material from commercial sources to meet their requirements, and the addi-

tional sum of \$1,874.88 expended by defendants in moving railroad cars for loading.

VIII.

Plaintiffs were without fault or neglect in stockpiling a quantity of ballast material insufficient to satisfy defendants' requirements.

IX.

The last payment due from defendants to plaintiffs on account ballast material was paid on December 17, 1952.

X.

The prime contract between the defendants and the United States Government was altered, extended, and changed during the course of construction, and by reason of said changes, plaintiffs were called upon to furnish stand-by equipment, perform extra services and furnish extra materials outside the scope of the sub-contract agreement of these parties. The reasonable value of said services and materials was \$14,582.92.

XI.

Defendants presented a claim to the United States Government, through the Corps of Engineers, for payment on account the extra services and material furnished by plaintiffs as aforesaid, and said claim was approved and allowed. On April 1, 1953 defendants received payment in the sum of \$14,582.92 from the United States Corps

of Engineers on account said claim for extra services and materials furnished by plaintiffs.

XII.

Defendants were acting for and on behalf of plaintiffs in presenting the aforesaid claim to the United States Government.

XIII.

The reasonable value of defendants' services for administrative expense in presenting the aforesaid claim to the United States Government is a sum equal to 5% of the award, to-wit: \$729.14, together with an additional sum equal to 1% of the award for bond expense, to-wit: \$145.83.

XIV.

The sum of \$9,867.87 for ballast material withheld by defendants from plaintiffs since December 17, 1952, and the sum of \$14,582.92, less 5% for defendants' administrative costs and 1% for bond expense, owing from defendants to plaintiffs since April 1, 1953, are both sums easily ascertainable by simple computation, or by reference to generally recognized standards, and the dates of defendants' default in failing to remit said sums to plaintiffs are as set forth above, and are fixed and easily determinable.

Based upon the foregoing Findings of Fact, the Court hereby makes and enters the following:

Conclusions of Law

I.

The above entitled Court has jurisdiction of these parties and of this cause.

II.

The agreement of these parties as to the manufacture and stockpiling of ballast material required that defendants furnish plaintiff with a final quantity requirement within the time contemplated by the sub-contract so as to enable plaintiffs to stockpile said quantity within said time. Any deficiency in defendants' requirements for ballast material was without fault or neglect on the part of plaintiffs and was resultant from defendants' failure to advise plaintiffs of final quantity requirements within the time contemplated by the sub-contract agreement.

III.

The plaintiffs fully performed that part of its sub-contract agreement with defendants as to quantity of ballast material to be furnished.

IV.

Defendants have no legal or equitable right to withhold payment to plaintiffs of any part of the full amount owing under the terms of the sub-contract agreement on account ballast material stockpiled and delivered by plaintiffs to defendants, and defendants wrongfully withheld the sum of \$9,867.87 on account payment for ballast material, which sum should have been paid by December 17, 1952.

V.

Defendants are entitled to continue to retain the sum of \$1,874.88 on account their stipulated cost of moving railroad cars, and plaintiffs are not entitled to recover anything from defendants on account their claim for expense incurred in moving railroad cars for loading ballast material. The terms and language of the sub-contract agreement impose upon plaintiffs the obligation to move railroad cars for loading without additional cost to defendants.

VI.

The standby equipment, extra services and extra materials furnished by plaintiffs and for which defendants received in satisfaction of a claim submitted on behalf of plaintiffs to the United States Government the sum of \$14,582.92 embodied work and material outside the scope of the sub-contract agreement of these parties.

VII.

Defendants were acting for and on behalf of plaintiffs in presenting claims to the United States Government on account extra services and materials furnished by plaintiffs, and the full sum of \$14,582.92 received by defendants on April 1, 1953 from the United States Government in payment of said claims should have been paid to plaintiffs, less 5% of the award for defendants' administrative expense, and 1% of the award for bond expense.

VIII.

Plaintiffs are entitled to recover interest at the rate of 6% per annum from December 17, 1952 until paid on the sum of \$9,867.87, and interest at a like rate from April 1, 1953 until paid on the sum of \$13,707.94.

Let judgment be entered accordingly.

Dated this 6th day of May, 1957.

/s/ WILLIAM G. EAST,
Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 6, 1957.

In the United States District Court for the
District of Oregon

Civil No. 7852

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS, and RACHEL CURTIS, a co-
partnership, doing business as CURTIS
GRAVEL COMPANY, Plaintiffs,

vs.

WM. A. SMITH CONTRACTING CO. INC., of
Missouri, a coporation, and WM. A. SMITH
CONTRACTING COMPANY OF CALIFOR-
NIA, a corporation, doing business as a joint
venture under the name of LOOKOUT POINT
CONSTRUCTORS, Defendants.

JUDGMENT

This matter came on for trial before the Honor-

able William G. East on the 30th day of January, 1956; plaintiffs appearing by Marland Curtis and by Albert L. Ramacciotti and Robert E. Radcliffe, their attorneys; defendants appearing by Gordon H. Keane and Eric R. Haessler, their attorneys; the parties expressly waived a jury; a Pre-Trial Order was duly signed by the Court and entered of record; testimony of the parties was presented and admitted and argument of respective counsel was heard; the parties thereafter rested and the Court took the matter under advisement; the Court thereafter rendered its decision and made Findings of Fact and Conclusions of Law.

Based upon the Findings of Fact and Conclusions of Law made and entered in the above entitled action:

It Is Therefore Ordered, Adjudged and Decreed that plaintiffs have Judgment against defendants, and each of them, in the sum of \$9,867.87, with interest thereon at the rate of 6% per annum from December 17, 1952, until paid; and the further sum of \$13,707.94 with interest thereon at the rate of 6% per annum from April 1, 1953 until paid.

Dated this 6th day of May, 1957.

/s/ WILLIAM G. EAST,
Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 6, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Defendants hereby appeal to the Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this action on the 6th day of May, 1957 in favor of the Plaintiffs and against the Defendants wherein judgment was given against Defendants and each of them in and for the sum of \$9,867.87, together with interest at the rate of 6% per annum from December 17, 1952 until paid, and for the allowance of interest only upon the sum of \$13,707.94 at the rate of 6% per annum from April 1, 1953 until paid.

Dated June 3rd, 1957.

/s/ GORDON H. KEANE,
/s/ ERIC R. HAESSLER,
KEANE AND HAESSLER,
Attorneys for Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 4, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That the National Surety Corporation, a corporation created, organized and existing for and by vir-

tue of the laws of New York, having its principal place of business in New York, New York, and duly authorized to carry on a general casualty insurance business within the State of Oregon and in the Courts of the United States, is held and firmly bound unto Marland Curtis, Lyman Curtis, Glen C. Curtis, and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company, the Plaintiffs, in the full and just sum of Twenty Thousand and No/100 Dollars (\$20,000.00) to be paid to said administrators, executors, successors or assigns of Plaintiffs, Marland Curtis, Lyman Curtis, Glen C. Curtis, and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company, to which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this 3rd day of June, 1957.

Whereas, on May 6, 1957, in an action pending in the United States District Court for the District of Oregon between Marland Curtis, Lyman Curtis, Glen C. Curtis, and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company as Plaintiffs, and Wm. A. Smith Contracting Co. Inc., of Missouri, a corporation, and Wm. A. Smith Contracting Company of California, a corporation, doing business as a joint venture under the name of Lookout Point Constructors as Defendants, Civil Action No. 7852, final judgment was entered in favor of said Plaintiffs and against said Defendants for the sum of \$9,867.87 with interest thereon at the rate of 6% per annum from December 17,

1952, until paid, and for the further sum of \$13,707.94 with interest thereon at the rate of 6% per annum from April 1, 1953, until paid; and the said Defendants having filed a Notice of Appeal from a part of said judgment, namely, the judgment for \$9,867.87 with interest thereon at 6% per annum from December 17, 1952, until paid, and the judgment for interest at 6% per annum upon the sum of \$13,707.94 from April 1, 1953, until paid, to the United States Court of Appeals for the Ninth Circuit;

Now Therefore, the condition of this obligation is such, that if the said Defendants, Wm. A. Smith Contracting Co. Inc., of Missouri, a corporation, and Wm. A. Smith Contracting Company of California, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, shall prosecute the appeal to effect and shall satisfy that part of the judgment so appealed from, together with costs, interest and damages for delays, if for any reason the appeal is dismissed, or if the judgment is affirmed, or shall satisfy in full such modification of that part of the judgment so appealed from and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] NATIONAL SURETY
CORPORATION,

/s/ By ALICE T. BIRKEMEIER,
Attorney in Fact.

Countersigned:

PHIL GROSSMAYER CO.,
Resident Agents.

/s/ By ALICE T. BIRKEMEIER.

Approved: June 4th, 1957.

/s/ WILLIAM G. EAST,
United States District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 4, 1957.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the Defendants as Appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed herein on June 4, 1957, the following portions of the record, proceedings and evidence in this action.

1. The Pre-Trial Order.
2. The Opinion of the Court.
3. The Findings of Fact and Conclusions of Law.
4. The Judgment.
5. The Notice of Appeal.
6. The Statement of Points on Appeal.
7. The Bond on Appeal.

8. This Designation.

9. The following portions of the Transcript of Testimony adduced in the trial:

* * * * *

10. Order of the Court directing transmittal of the original exhibits to the Clerk of the United States Court of Appeals for the Ninth Circuit.

KEANE AND HAESSLER,
/s/ By GORDON H. KEANE,
Attorneys for Defendants-
Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 12, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

This is an appeal from that part of the Judgment awarding Plaintiffs the sum of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars (\$9,867.87) together with interest at Six Percent (6%) per annum from December 17, 1952, until paid, arising from Defendants having been required to obtain additional ballast material from other sources, and, also, the allowance to Plaintiffs of interest upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars (\$13,707.94) at Six Percent (6%) per annum from April 1, 1953, until paid. From the remainder of said Judgment Defendants have not appealed.

The points upon which Defendants-Appellants will rely are:

1. The Court erred in failing to hold that Plaintiffs were bound under their subcontract with Defendants by the terms and conditions of the general contract between Defendants and the United States, which general contract was specifically incorporated in said subcontract by reference.

2. The Court erred in holding that Plaintiffs were not obligated to furnish all ballast material required to complete Defendants' contract with the United States.

3. The Court erred in holding that Plaintiffs were without fault or negligence in stockpiling a lesser quantity of ballast material than was necessary to complete Defendants' contract with the United States.

4. The Court erred in holding that Defendants were obligated, under the terms of their subcontract with Plaintiffs to notify Plaintiffs of the exact quantity of ballast material to be produced to complete the work contemplated by Defendants' contract with the United States.

5. The Court erred in failing to find that it would have been impossible for Defendants to anticipate the quantity of ballast material required to complete the work required under Defendants' contract with the United States prior to the date upon which the Plaintiffs dismantled their crushing plant.

6. The Court erred in holding that Plaintiffs

fully performed their subcontract with Defendants as to the quantity of ballast material to be furnished.

7. The Court erred in holding that Plaintiffs were entitled to interest at Six Percent (6%) per annum from April 1, 1953, until paid, upon the sum of Thirteen Thousand Seven Hundred Seven and 94/100 Dollars (\$13,707.94).

8. The Court erred in failing to enter judgment for Defendants with respect to Plaintiffs' demand of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars (\$9,867.87).

9. The Court erred in holding that Plaintiffs were entitled to interest at Six Percent (6%) per annum from December 17, 1952, until paid, upon the sum of Nine Thousand Eight Hundred Sixty-Seven and 87/100 Dollars (\$9,867.87).

KEANE AND HAESSLER,
/s/ By GORDON H. KEANE,
Attorneys for Defendants-
Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 12, 1957.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF EXHIBITS

It Appearing to the Court that on the annexed consent of the attorneys for the respective parties and good cause appearing, it is hereby

Ordered that the original exhibits in this cause be transmitted by the Clerk of this Court to the Clerk of the United States Court of Appeals for the Ninth Circuit, to be retained by the said Clerk for inspection by the Court of Appeals until final disposition of the appeal herein and then to be returned to this Court.

Dated December 12th, 1957.

/s/ WILLIAM G. EAST,
United States District Judge.

The entry of the foregoing Order is hereby consented to and notice of the entry thereof is hereby waived.

/s/ GORDON H. KEANE
Of Attorneys for Defendants-
Appellants.

/s/ ROBERT E. RATCLIFFE
Of Attorneys for Plaintiffs-
Appellees.

[Endorsed]: Filed December 12, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pre-Trial Order, Memorandum of Judge East, Findings

of Fact and Conclusions of Law, Judgment, Notice of Appeal, Supersedeas Bond, Motion to Extend Time for Filing Record and Docketing Appeal, Order extending time to file record and docket appeal, Designation of Contents of Record on Appeal, Statement of Points on Appeal, Order for Transmittal of Exhibits and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7852, Marland Curtis, Lyman Curtis, Glen C. Curtis, and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company, plaintiffs and appellees vs. Wm. A. Smith Contracting Co. Inc. of Missouri, a corporation, and Wm. A. Smith Contracting Company of California, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, defendants and appellants; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith reporter's transcript of testimony, February 13 and 15, 1956, January 30-31, 1956 and February 1-2, 13 and 15, 1956, and February 1-2, 1956, filed in this office in this cause, together with Exhibits of plaintiff Nos. 1, 2, 10, 11, 13, 19, 20, 21 and 34, and defendants' Exhibits Nos. 1 to 8, inclusive, 14 to 18, inclusive, 21, 22, 24 to 30, inclusive, 32, 31, 33, 35, 36 and 40.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 12th day of December, 1957.

[Seal] R. DeMOTT,
Clerk,
/s/ By MILDRED SPARGO,
Deputy Clerk.

United States District Court
District of Oregon

Civil No. 7852

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS and RACHEL CURTIS, a co-
partnership, doing business as CURTIS
GRAVEL COMPANY, Plaintiffs,

vs.

WM. A. SMITH CONTRACTING CO. INC., of
Missouri, a corporation, and WM. A. SMITH
CONTRACTING COMPANY OF CALIFOR-
NIA, a corporation, doing business as a joint
venture under the name of LOOKOUT POINT
CONSTRUCTORS, Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable William G. East, U. S. Dis-
trict Judge.

U. S. Courthouse; Portland, Oregon. January 30-
31, February 1-2, 13 and 15, 1956.

Appearances: Messrs. Albert L. Ramacciotti and

Robert E. Ratcliffe, Attorneys for Plaintiff; Messrs. Gordon H. Keane and Eric R. Haessler, Attorneys for Defendants.

(Whereupon the following proceedings were had:) [1]*

* * * * *

MARLAND G. CURTIS

produced as a witness on behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ramacciotti): Your name is Marland Curtis? A. Yes, sir.

Q. Do you reside in Spokane?

A. That's right.

Q. According to the stipulation you are one of the partners constituting the plaintiff?

A. Yes.

Q. Mr. Curtis, it has been stipulated and is incorporated into the pre-trial order here that your company manufactured 58,434 cubic yards of ballast material under a subcontract in evidence here with the defendant. A. That's right.

Q. Was it delivered to the defendant?

A. Yes, it was delivered into cars.

Q. The measurement, Mr. Curtis, was car measurement. That, I think, is stipulated.

A. That's correct.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

(Testimony of Marland G. Curtis.)

Q. Have you been paid on account the contract price for that number of yards of ballast?

A. No, we haven't. [52]

Q. According to the stipulation, there is an unpaid item of \$11,742.77. Is that the amount that is unpaid?

A. Yes, it is.

Q. On that item?

A. On that item, it is.

Q. Now, were you paid the balance of the amount due your company on account ballast?

A. On account of ballast we were.

Q. What is that?

A. We were—outside of that, I think we were paid for the rest of the ballast. [53]

* * * * *

Q. Now, your business, Mr. Curtis; that is, the business of Curtis Gravel Company, is what?

A. Most of our work has been manufacturing and stock-piling different kinds of aggregate and ballast.

Q. Have you ever been a railroad contractor?

A. No.

Q. Have you ever engaged in the matter of the placement of tracks? [55]

A. No.

Q. Or rails for the Government or for railroads?

A. No.

Q. Are you acquainted with the procedures and practices of railroad contractors with reference to the placement of their ballast?

A. Not except just what I have observed driving by a job or watching somebody else do it.

Q. In connection with this job or contract at

(Testimony of Marland G. Curtis.)

Lookout Point, did you at any time make any observations as to the requirements of gravel or ballast? A. No; because we didn't—

Q. Were you asked to check the requirements?

A. Not until, I think it was, sometime in the summer of '52.

Q. Was that before or after you had stock-piled the amount that has been referred to?

A. That was after we had stock-piled the amount that the contract called for and had removed our equipment from the site.

Q. Now, during the completion of the contract—that is, in so far as the stock-piling was concerned—did you have any correspondence with the defendant regarding the matter of the requirements for ballast?

A. Yes. We had letters and several conversations about it. [56]

* * * * *

Q. You say there were some conversations, Mr. Curtis. Do you recall when you first discussed it as to the requirements with a representative of the defendant?

A. I don't recall the exact date, no.

Q. Can you approximate the time?

A. It would be sometime during the month of October.

Q. Of 1951? A. 1951.

Q. Now, you have made mention of correspondence, and I am handing you for your inspection

(Testimony of Marland G. Curtis.)

Exhibit 2-A, which is a letter [57] dated September 14th. Was that letter written by your firm?

A. Yes, it was.

Q. That is a copy, of course. Do you know who wrote the letter? A. Mr. Thompson.

Mr. Ramacciotti: There is no dispute as to the letter?

Mr. Haessler: It has already been received in evidence.

Mr. Ramacciotti: Yes.

Q. Now, referring to the latter portion, the last paragraph, as a matter of fact, was that letter and that particular language used under your direction by Mr. Thompson? A. Yes, it was.

Q. And who was Mr. Thompson?

A. Mr. Thompson was the superintendent on the job, in charge of the job.

Q. Now, you have referred to letters. Let me ask that you look at another letter which is marked Exhibit 2-C, and please state whether or not that pertains to the ballast that we were talking about?

A. Yes, it does.

Q. And, likewise, 2-E. A. Yes.

Q. Now, with the dates of those letters in mind, Mr. Curtis, can you tell us about when it was that there was conversation in which you took part regarding the matter of the requirements [58] of ballast for this particular job? You say in October. Was there just one conversation, or were there more?

A. There was several conversations about it. I

(Testimony of Marland G. Curtis.)

wasn't on the job all the time. And whenever I went—when I visited the job, then we talked about the quantity of ballast.

Q. Who was on the job in so far as a resident or local manager, so far as the defendant was concerned? A. A Mr. Salm.

Q. Did you ever talk with him about the matter of requirements? A. Yes. [59]

* * * * *

Q. Now, Mr. Curtis, running through the Contentions of Fact of the plaintiff in the pre-trial order, there is the item of the production of ballast. The contract called for how many thousand cubic yards? A. 56,000.

Q. Your production was how many?

A. 58,400-and something.

Q. By what means was the measurement effected as to the number of cubic yards?

A. That was measured in railroad cars.

Q. Was that the basis for measurement provided for in your agreement with the defendant?

A. Yes, it was. [63]

Q. Did you make measurement in stock pile as well? A. Yes, we did.

Q. Was there any discrepancy or any variation between the measurement in cars and the stock-pile measurement?

A. Yes, there was, because stock-pile measurement was greater than the car measurement because of the loss owing when you reclaim it out of the stock pile.

(Testimony of Marland G. Curtis.)

Q. That is, some ballast at the bottom of the pile that was *lot* and not actually used?

A. That's right.

Q. Was any part or a portion of the ballast that was loaded into cars rejected; that is, any part of the 58,434 cubic yards rejected by the Corps of Engineers?

A. No.

Q. Now, do you know from your experience—well, first perhaps I should ask you how long have you been in the ballast and crushing of rock or gravel business?

A. Approximately 20 years.

Q. And you have been engaged actively in that business during that time, Mr. Curtis?

A. Yes.

Q. From your experience and from your background in the business that you have referred to do you feel that you are able to state an opinion with reference to the usual practice in the trade with reference to the matter of performance of a [64] contract for an uncertain amount of gravel to be furnished or ballast to be furnished by a fixed date?

Mr. Haessler: I would like to interject before he answers. You are asking with regards to a customary contract and not with regard to this particular contract; is that correct?

Mr. Ramacciotti: Contracts of this type that have to do with a fixed date.

Mr. Haessler: You are not asking for a proposal of the law of this witness?

(Testimony of Marland G. Curtis.)

Mr. Ramacciotti: I am asking him for an opinion as to the custom in the trade, not as to this contract, particularly.

The Witness: Our experience has been, and I think I could say it is a custom of the trade, when you have a contract to produce material and stock-pile it on a certain date prior to its use you have to know the quantity that you are going to produce or you can't produce it. And all of the other contracts we have had similar to this, the prime contractor always advises us of the amount of the material that we are to produce and then if it is more or less than the requirements, the requirements of the contract are changed later, then he obtains the additional material elsewhere; or if he has got an excess, why, he does whatever he pleases with that.

But we have always got the quantity that they require, and then when we finish we get paid for it.

Q. Now, Mr. Curtis, the contract in evidence sets forth the date for the completion of the stock-piling of ballast as the 11th of October, 1951. Were you completed with your stock-piling by that date?

A. No, we weren't.

Q. Do you remember when your stock-piling was completed? A. December 22nd.

Q. 1951? A. 1951.

Q. Will you state the reason, if any, for your not having completed this stock-piling by the date fixed?

A. Because the progress of the work where the

(Testimony of Marland G. Curtis.)

ballast had to be used was being delayed and there was no necessity of having the ballast stock-piled by that date.

Q. Now, if you were going to meet the date, would that have required one or more shifts on your crushing equipment?

A. We would have had to work two shifts then.

Q. So that as it was how many shifts did you use?

A. We worked two shifts for a while, and then we changed to one shift when we could see that there was no urgency for having the material stock-piled.

Q. Now, the stock pile was completed to the extent of these 58,000-plus cubic yards, you say, in December? A. Yes.

Q. And I think you say that it was not until April that any [66] portion was removed for application to the track? A. That's correct.

Q. Did you agree to this delay? A. No.

Q. Or accede to it? A. No.

Q. Do you know whether or not the defendants or any of their representatives that have been referred to here; that is, either Mr. Huncke or Mr. Moore or Mr. Salm, agreed to your slowing up and delaying in the production of the ballast in the stock pile?

A. Yes. It was discussed with Mr. Salm, and he agreed that there wasn't any urgency for meeting the October 11th deadline.

(Testimony of Marland G. Curtis.)

Mr. Haessler: May I have that answer read back, please?

(Whereupon the witness' last answer was read by the Court Reporter.)

Q. (By Mr. Ramacciotti): The Contentions of Fact of the plaintiff here make reference to the matter of some 9,000 additional cubic yards of ballast material that were used on this job by the defendants and that were not—the use of same was not made known to you; that is, over and above the amount that was originally contemplated. Were you informed before you dismantled your ballast equipment of any additional requirements other than as set forth in the prime contract? A. No. [67]

Q. Or the subcontract? A. No.

Q. Were you ever furnished with any supplemental contract changing the requirements of the Corps of Engineers in so far as ballast was concerned? A. No.

Q. Were you ever furnished with any change orders—— A. No.

Q. ——issued from the office of the Corps of Engineers with reference to ballast requirements? A. No.

Q. The contentions or facts of the plaintiff make reference to the fact that the Corps of Engineers by one change order allocated and paid or tendered to the defendant some \$1845 in connection with additional ballast.

Mr. Haessler: Whose contentions are those?

Mr. Ramacciotti: That is our No. 9.

(Testimony of Marland G. Curtis.)

Q. Were you informed of the payment of that amount— A. No, I wasn't.

Q. —to the defendants or the tendering of that amount in connection with ballast that was used on this job after the completion date of the contract? A. No.

Q. Now, let us get back to the matter of the custom of the trade, Mr. Curtis, with regard to the moving of cars for loading. [68]

* * * * *

Q. Now, there has been something said about the matter of your dismantling your crushing equipment, Mr. Curtis. And, in that connection, do you know whether or not—or did you personally,—let me put it that way,—notify the defendants that you were going to dismantle it prior to the dismantling? A. Yes, we did.

Q. Did they at the time of your giving them notice register objections to your so doing?

A. No.

Q. Now, do you know, Mr. Curtis, whether or not the defendant did any ballast work on the track prior to the time that the gravel pile or gravel stock pile was first packed for the operation?

A. Not to my knowledge.

Q. Was there any other gravel used or any other ballast used on the job save that furnished by you and that procured afterwards, to your knowledge?

A. Do you mean on the total contract?

Q. That's right.

A. They purchased ballast from other sources

(Testimony of Marland G. Curtis.)

for one section of the contract, Section A, which was across the river from where we worked. But we didn't have anything to do with that.

Q. In connection with the 16 miles of the track that we are concerned with, so far as you know there was none purchased other than from you under the contract that is in evidence here and from Springfield Sand and Gravel at a later date?

A. That is right.

Q. Do you know whether or not there was any track of the S. P. on this relocated line made available for ballast and for laying prior to this 2nd of April when the first ballast was removed from your stock pile?

A. Yes, I think there was approximately four miles of roadbed that was ready for track some time before that.

Q. Do you remember how far back prior to that time this four miles was made available?

A. No, I don't. But, as near as I can remember, there was, I believe, two miles ready before we completed our ballast stock pile.

Q. Then two more miles approximately?

A. Then two more miles were——

Q. Now, what is the fact as to whether in your opinion a [71] determination as to requirements could have been had if the defendant had ballasted this track that was available, this distance of some four miles that was available, to determine the requirements, that is, subsistence-wise, and so forth?

(Testimony of Marland G. Curtis.)

A. I think that that four miles could have been ballasted before.

Mr. Haessler: I would like to object to that, sir. He has stated previously that he had no previous knowledge of this type of work, that he is ignorant of it, that he doesn't know anything about the circumstances of railroad laying. And now he has been asked for what certainly calls for expert testimony on the question of knowledge of whether railroad ballast can be properly laid or not.

The Court: I think I will sustain the objection to it. You may proceed by way of offer of proof.

Mr. Ramacciotti: We will pass the matter. I think we will have some other testimony, if your Honor please.

The Court: Very well.

Q. (By Mr. Ramacciotti): In the course of these discussions and in connection with the letters that were written did the defendants ever advise you as to a definite quantity— A. No.

Q. —other than as set forth in the original contract? A. No.

Q. Mr. Curtis, it's my understanding that you met with [72] Mr. Huncke before the actual execution of the subcontract here in evidence.

A. Yes, we had.

Q. For discussions. And I understand that you had one meeting with him at a hotel in Pasco, is that correct? A. That's correct.

Q. Now, at that time and at that meeting what was discussed with reference to the requirements

(Testimony of Marland G. Curtis.)

of the ballast and the matter of giving notice as to the requirements of the—

Mr. Haessler: If your Honor please, before the question is answered could he specify the time that the meeting was held?

Mr. Ramacciotti: I will endeavor to.

Q. Do you recall about when that meeting in Pasco was had?

A. It was about April 1st, 1951, but I wouldn't be sure of the exact date.

Q. Now, tell us what, if anything, was said by Mr. Huncke with reference to the ballast requirements. Was that discussed?

A. Yes, it was discussed.

Q. And do you recall what was said?

A. At that time Mr. Huncke assured us that he would advise us of the final quantities so that we could have them stockpiled on time.

Q. Was anything said at that time at that meeting with regard to the matter of the moving of the cars? [73]

A. No. [74]

* * * * *

Cross Examination

Q. (By Mr. Haessler): Mr. Curtis, you have testified you were ignorant of the procedures of the work being done here. Had you ever furnished ballast for railroad contractors or for railroad work before this job? [76]

A. We had two ballast contracts before this job. One was for the Milwaukee Road and one was for the Corps of Engineers. However, both contracts

(Testimony of Marland G. Curtis.)

were for the material in the stock pile. So we never had any connection with the placing of the ballast.

Q. Did your contract require you to place ballast here? A. No.

Q. Well, then, how was this contract different from the two contracts you had before?

A. It didn't materially differ.

Q. In other words, then, you had two contracts before which were just like this one?

A. Basically, yes.

Q. Didn't you feel your experience in those contracts gave you some knowledge as to what you might expect on this one?

A. In what regard?

Q. Well, you have testified you were ignorant of the circumstances, the situations of this job; that you had no way of evaluating what the requirements were because you didn't know anything about it.

A. That's correct.

Q. But now you tell me you have produced ballast for similar jobs before?

A. That is correct. [77]

Q. Didn't you get any education or any experience on the previous jobs which might enable you to evaluate your obligations under this contract?

A. Yes. We learned—or we knew before we took the contract that in order to stock-pile a given amount of material you have to know the quantity.

Q. All right. Now, let me ask you about the contract. You have testified there were some con-

(Testimony of Marland G. Curtis.)

versations which took place in late March, early April, concerning the contracts; is that right?

A. That's correct.

Q. When did you sign the subcontract?

Let me have Exhibit 2, if you would, please.

Mr. Ratcliffe: Right here it is.

Mr. Haessler: I think that's probably the best evidence, and I will show it to the witness.

Q. I hand you Exhibit 2. Would you advise the Court of the date of execution? I think you might read the first sentence of the contract, if you would, please. This is the agreement which has been stipulated between the parties as being the subcontract which is in issue in this case.

A. The subcontract agreement is dated June 10th.

Q. All right. Now, did you sign this on June 10th?

A. I am not sure.

Q. Well, did you sign it on or about June 10th?

A. I signed it probably somewhere—sometime in June, I'd say.

Q. You signed it sometime in June?

A. I could check the record and tell—

Q. Now,—

A. —the letters of transmittal when I signed it.

Q. But it was sometime in June. Conversations, however, commenced at sometime late in March or not—definitely not later than the 1st of April concerning this contract, is that right?

A. That's correct.

(Testimony of Marland G. Curtis.)

Q. Would you tell the Court in your own words what took place? In other words, you talked and then was a draft sent out, and did you send it back, or what were the steps that took place in the formation of this contract?

A. There were several conversations which I don't recall the dates or just exactly what was said. But the last meeting that we had on it——

Q. When was this last meeting?

A. That was around the 1st of April.

Q. All right.

A. We discussed the contract and the terms of it.

Q. Did you have a written draft of the contract before you at that time? A. No. [79]

Q. There was nothing in writing; this was just talk?

A. That's correct. First written draft we had was, I believe, May 12th. But I wouldn't be sure about that without checking my records.

Q. That's the first written draft you had?

A. Yes.

Q. Who prepared that draft?

A. Mr. Huncke.

Q. What did you do with that draft? Did you propose changes in it?

A. We proposed changes. That wasn't written in accordance with the verbal agreements that we had and it was returned to the company.

Q. Were changes made in it? A. Yes.

Q. Changes were made in it? A. Yes.

(Testimony of Marland G. Curtis.)

Q. Now, prior to these conversations did you submit a proposal to the defendant; that is, to Lookout Point Constructors for furnishing the gravel on this job? A. That's correct.

Q. About what time did you submit that proposal?

A. It was sometime, I believe, the first part of March.

Q. First part of March? A. Yes. [80]

Q. Was that proposal submitted in writing?

A. Yes, it was.

Q. How did you go about preparing for the submission of that proposal? Let me ask you this first: How did you hear that they had the prime contract for the job? How did you learn that?

A. I don't remember.

Q. All right. A. That's a long time ago.

Q. Well, that's perfectly all right. How did you go about getting sufficient information to submit a proposal on the job? How did you learn what the job consisted of, in other words?

A. By conversations with Mr. Huncke and copies of the specifications.

Q. You had copies of the specifications of the contract, then, before you submitted your proposal?

A. Of the detailed specifications of the ballast.

Q. All right.

A. Not of the entire contract.

Q. Where did you get those copies of the specifications? Who sent you or who gave you the copies of the specifications?

(Testimony of Marland G. Curtis.)

A. As near as I can remember, it was Mr. Huncke.

Q. In other words, did Mr. Huncke approach you in the first instance, or did you write him asking about the job? [81]

A. I believe that he approached me.

Q. That's your understanding; he approached you? Then you looked over the specifications and studied them, or did you study the specifications before you submitted your proposal?

A. Yes; on the ballast itself.

Q. And then did you also look over the site before submitting your proposal? A. Yes.

Q. You did? How much time did you spend looking over the site?

A. Oh, as near as I can remember, probably three or four hours.

Q. At the time you looked it over were you satisfied that you had done a sufficiently careful job to be informed as to the conditions at the site?

A. Yes.

Q. Then, so that I may be sure I have the sequence right, you had the specifications for the job, you went down and looked over the site, then you came back and submitted a proposal?

A. That's correct.

Q. In response to that proposal there were conversations which took place between you and Mr. Huncke on or about April 1st and, perhaps, at other times; is that correct?

(Testimony of Marland G. Curtis.)

A. There is one thing in there I'd like to explain. [82]

Q. All right.

A. In preparing our proposal we had the specifications on the ballast. We submitted a proposal based on the stock-piling of the 56,000 yards of ballast by a given date.

Q. All right.

A. We didn't have copies of the rest of the contract, or we didn't know what the completion date on the entire contract, what anything else involved. We proposed to furnish 56,000 yards of ballast at a given price by a certain date.

Q. That was your proposal?

A. That's right.

Mr. Haessler: Now, may I have Exhibit 1, if you please, the contract and the specifications?

Q. Now, Mr. Curtis, I hand you Exhibit 1, consisting of the contract and specifications embodied therein. Now, just what document did you have, the specifications and not the contract or just what documents did you have or what documents were furnished to you?

A. Could I check our files on that?

Q. Is it here? A. Yes.

Q. Certainly.

A. Have you got that? The original P & R?

Mr. Ramacciotti: Copy, original, what?

The Witness: Our original proposal. [83]

Mr. Ramacciotti: That is the letter?

The Witness: Yes.

(Testimony of Marland G. Curtis.)

Q. (By Mr. Haessler): These are the pages you had?

A. These two.

Q. These two. Marked specifications for crushed rock ballast?

A. And here——

Q. Well, now, in other words, all you had were those specifications for crushed rock ballast at the time you submitted your proposal?

A. That is correct.

Q. What did your proposal embody? Did it embody any work other than the ballast?

A. Yes, it did.

Q. What other work did it embody?

A. Slide removal and roadbed topping.

Q. Well, you mean, then, you made a proposal with regard to slide removal without having any information or the specifications on that?

A. We——

Q. You testified the only information you had were these pages relating to ballast.

A. That's pertaining to the ballast. We also had sheets as I showed you in there pertaining to slides.

Q. What about roadbed topping? Did you also have sheets pertaining to that? [84]

A. I don't remember that we did have, but if we did they are in there.

Q. Would it be your practice to submit a proposal for roadbed topping without knowing what the work involved?

A. We submitted the proposal. On the things we didn't know about the work we took Mr. Huncke's word for it.

(Testimony of Marland G. Curtis.)

Q. In other words, you submitted a written proposal to Mr. Huncke concerning roadbed topping without knowing what it entailed?

A. No, we knew what it entailed.

Q. How did you know what it entailed?

A. We visited the site and we talked to the Army Engineers.

Q. You talked to the Army Engineers?

A. Yes.

Q. Where did you talk to the Army Engineers?

A. At Lookout Point.

Q. Down at Lookout Point? A. Yes.

Q. Did the Army—did you see the specifications for the roadbed topping?

A. I believe that there is a grade issue specification in there with the ballast on the roadbed topping.

Q. Then you saw the specifications covering everything that went into your proposal? [85]

A. The detail specifications, yes. I mean, the sift analysis, should we say, of the rock, the quality of the rock.

Q. Well, then, by specifications I mean the specifications which are embodied in the contract. Did you see those specifications, specifications which were embodied in the prime contract between the United States Government and—

A. I saw parts of them but not the specifications in its entirety.

Q. Now, to get back to the conditions of the contract, after the conversations this draft was sent

(Testimony of Marland G. Curtis.)

to you and you made changes in it, or you submitted changes and it went back to Kansas City and those changes were made. Then what happened? Then did they send a revised draft back to you? A. Yes.

Q. Then what happened after that?

A. Then there were some things that weren't in the contract that had been discussed which were substantiated at a later date by letter.

Q. Do you have the letter? A. Yes.

Q. Now, let me ask you, these were changes before the signing of the contract?

A. Afterwards. Well, they were things that were discussed before the contract was written. [86]

Q. I see.

A. But by the time we finally got the contract from Kansas City we had considerable amount of the work done and we didn't feel that we should upgrade throughout the entire contract without a contract. So we took it as it was.

Q. However, the contract that you finally got back from Kansas City embodied changes in it which you had previously requested, isn't that correct? A. Yes.

Q. So you have testified. Did you see a copy of the prime contract including the specifications before you signed the subcontract?

A. I probably did, yes.

Q. You say you probably did.

A. I don't remember the exact time, but by the time we signed the subcontract we were well into

(Testimony of Marland G. Curtis.)

the work and I had to see the specifications before that time.

Q. The contract which you signed, the subcontract, contains this provision: "All provisions of the general contract and the specifications and the working drawings are included as a part of this subcontract the same as though written in full herein." I will let you see the clause. That's the final clause. That would be immediately before place of signature.

Would you have signed a subcontract including the terms of the general contract and specifications without [87] knowing what the terms of the general contract and the specifications were?

A. At the time that I signed the contract I was familiar with the general contract.

Q. All right. You were familiar, then, in early June, but you were not familiar in March when you made your proposal; is that correct?

A. That's correct.

Q. Well, when did you become familiar with the terms of the contract? A. That I am not sure.

Q. You are not sure, but it's sometime between the time you made your proposal and the time you signed the contract you became familiar with the terms of the general contract?

A. That's correct.

Q. So at the time you signed this subcontract agreement you were familiar with the terms of the general contract and the specifications?

A. Yes.

(Testimony of Marland G. Curtis.)

Q. All right. Now, at the time you signed the subcontract were you also familiar with all the requirements of the job which you were to do? In other words, were you familiar with the site? You testified you were ignorant earlier of the job to be performed.

A. I said that I was ignorant of the placing of the ballast. [88]

Q. In other words, you were ignorant of how to place ballast, but you were not ignorant of the other requirements of the job? You were not ignorant of the nature of the work being performed there? At least, you were not ignorant as to what you were supposed to do; is that correct?

A. That's correct.

Q. You have had twenty-odd years of experience in furnishing gravel or more, is that right? You have testified to a broad experience.

A. That's right.

Q. You are familiar, then, that one of the hazards in the construction job is that unanticipated problems or difficulties may arise during the course of it?

A. That's correct.

Q. So, when you signed this you realized that there might be unanticipated difficulties or problems on the part of any person who performed?

A. Yes.

Q. And I presume one reason you went to the site and familiarized yourself with it was so that you could anticipate those difficulties or evaluate what you might face; is that correct?

(Testimony of Marland G. Curtis.)

A. Why, you can't anticipate those difficulties by looking at the site.

Q. Well, why did you go to the site then? [89]

A. To investigate the conditions that you knew that existed.

Q. In other words, you investigated the conditions at the site? A. Yes.

Q. Did you take those conditions into account when you submitted your proposal or when you signed the subcontract? A. Yes.

Q. So that the rate at which you agreed to perform the agreed work in determining those rates you drew on the knowledge you had obtained from investigating the site? A. Partially, yes.

Q. Partially. Thank you. All right. Now, going over here as to quantity you have testified that the contract called for 56,000 yards of gravel; is that your interpretation of the contract you signed?

A. Yes.

Q. Why, if it called for 56,000 yards of gravel, did you make 58,400?

A. Because there are two methods of measurement involved. 56,000 is based on car measurement. Our quantity that we had produced was based on cross-section measurements which could vary considerably from the car measurement.

So, in order to be safe, we stock-piled additional material to be sure that we had 56,000 yards of car measurement. [90]

Q. In other words, the only reason you produced any gravel in excess of 56,000 yards was be-

(Testimony of Marland G. Curtis.)

cause due to the difference between car measurement and measurement on the ground you might not have the total 56,000 based on your stock pile unless you allowed some overage for an allowance, is that correct? A. That's correct.

Q. Now, going back to the question of quantity, I'd like to invite your attention to a provision in the subcontract I'd like you to read aloud, if you please. And this is the contract you signed. Starting here, will you read this sentence down to where it says—well, read that. Start reading that paragraph aloud to the Court, please. Just start right here where it says—

A. "Estimated quantity 56,000 cubic yards. The quantities listed above are estimated only. The subcontractor will be required to complete the work specified above in accordance with this contract and at the price or prices, whether it involves quantities of greater than or less than the above shown estimates."

Q. Thank you. Now, let me—were you familiar with that clause of the contract when you signed the contract? A. Yes.

Q. What did you understand that clause to mean? In other words, what does that clause mean to you? [91]

A. That clause means that at any time prior to the completion of our stock-piling of the ballast the contractor could change the quantities if he wanted us to produce more or less than the 56,000 as long as he advised us prior to the time that we

(Testimony of Marland G. Curtis.)

had to have the ballast stock-piled. We would have made more or less than the 56,000.

Q. In other words, does the contract say anything about the contractor informing you as to the quantities required?

A. The contract doesn't, but it was agreed prior to the signing of the contract and was substantiated in a letter from Mr. Huncke subsequently that he would advise us of the quantities he wanted to stock-pile.

Q. You say it was agreed. However, under this clause it was your obligation to furnish all of the gravel required for the job; is that the way you understood this clause?

A. Yes; as long as we were advised of the quantity.

Q. You are reading in the phrase "as long as." It does not appear in the contract?

A. Well, you——

Q. Would you show me any place in this contract where it sets forth a provision that you are to be informed as to the precise quantity of gravel required?

A. No, it isn't in the contract.

Q. Isn't in the contract. Doesn't this contract do just the opposite? Doesn't it put you on specific notice that you [92] may have to furnish more or less gravel than 56,000? Doesn't it say that that's only an estimate?

A. That's correct.

Q. Did you take a theoretical estimate of the

(Testimony of Marland G. Curtis.)

gravel that would be required for this job? Did you make one? A. No.

Mr. Ramacciotti: Objected to as immaterial.

The Court: What do you claim for it?

Mr. Haessler: I believe the transcript will show, but I can't show it with precision, that he previously testified that he had determined theoretically what the requirements of the job were. However, I will withdraw the question. I don't recall the reference.

Q. Were you familiar with that portion of the general contract; that is, the prime contract between — entitled "Estimated Quantities, Section SC-3"—which states that the quantities are estimates only and that the contractor will be required to furnish all the gravel for the job, irrespective of whether it is more or less than the estimated sum? A. Yes.

Q. You were familiar with that? A. Yes.

Q. Then you understood that it was your obligation to furnish all the gravel required for the job and not merely 56,000 yards. But you qualify that by an alleged conversation [93] with Mr. Huncke in which he said that he would help you or he would let you know how much more you might have to furnish; is that your understanding of the agreement?

A. Not only a conversation but a letter from Mr. Huncke stating that he would advise us of the final quantities within two weeks.

Q. All right. Well, then, if there were not that

(Testimony of Marland G. Curtis.)

letter and that alleged conversation, your obligation would be to furnish all of the gravel required for the job and not merely 56,000 yards; is that correct?

A. Our obligation should be the intent of the parties when they entered into the contract.

Q. The intent—that's a statement of law, but it's also a statement of law that the intent of the parties is manifest by what they see and what they sign. What does this contract—well, we have pursued that line, I think, far enough. [94]

* * * * *

Q. Mr. Curtis, you have testified that you actually had 58,400 yards and not 56,000 yards; is that correct? Were you paid for 58,400 yards?

A. No, we weren't. We were not.

Q. Did you expect to be paid for 58,400 yards?

A. Yes, we did.

Q. In other words, you felt, in other words, that 58,400 yards was part of the contract? [95]

A. Yes.

Q. All that was part of the contract? Now, you have testified that you were never asked to check the quantity that you would have to produce, that you'd be required to produce, until the summer of '52; is that correct? A. That's correct.

Q. You further testified that you were never asked to determine the quantity until after you had dismantled your plant, your gravel-making plant; is that correct?

(Testimony of Marland G. Curtis.)

A. I can't remember the exact dates without checking the record on those things.

Q. Well, when did you dismantle your plant?

A. In February of 1952.

Q. You dismantled the plant in February?

A. February and March.

Q. You have testified that you were not asked to check the quantities till the summer of '52.

A. I can't remember the dates without checking the letters.

Q. Well, I think—I am certain the record will show, Mr. Curtis, that you testified on direct examination that you were never asked to check quantities until the summer of 1952. Do you wish to retract that statement now?

A. We received a letter from Mr. Huncke advising us to determine our own quantities. But I don't remember the date of the letter. [96]

Q. I see. Then you may have received that letter before you dismantled the plant; is that correct?

A. It may have been that early; I wouldn't be sure.

Q. I hand you here by courtesy of the Bailiff Plaintiffs' Exhibit 4-E, being a letter from—no. I beg your pardon. That's Plaintiffs' 4-F, being a letter dated December 3rd, 1951, from Mr. Huncke to you, Mr. Curtis. Would you read the first sentence or the first couple sentences of the second paragraph of that letter, please?

A. "I am sure that by the terms of our agree-

(Testimony of Marland G. Curtis.)

ment, that Curtis Gravel Company is obligated to produce all ballast material required, irrespective of the quantity needed.”

Q. Thank you. What was the date of that letter, please? A. December 3rd, 1951.

Q. When did you dismantle your plant?

A. February and March of 1952.

Q. In other words, you were put on notice, then, well in advance of the dismantling of your plant?

A. We were put on notice what is contained in this letter. We were not notified of the quantity to produce.

Q. You were not notified of the exact quantity?

A. No.

Q. But you were notified—at least in our extent, the defendants’ understanding of the contract, you were obligated [97] to produce all the ballast required for the job?

A. We were notified of that, yes.

The Court: What is the exhibit number?

The Witness: 4-F.

The Court: Thank you.

Q. (By Mr. Haessler): Did you reply to that letter, Mr. Curtis?

A. I am not sure without checking the records.

Q. You don’t have any recollection of having sent a written reply to that letter?

A. No, I don’t.

Q. Do you have any recollection of having made any reply to that letter?

A. Not specifically, no.

(Testimony of Marland G. Curtis.)

Q. Now, it was your contention that there was an alleged oral conversation between you and Mr. Huncke that he would notify you of the precise amount of ballast required for the job; is that correct?

A. There was an oral understanding before we signed the contract, and it was verified in writing prior to the writing of this letter.

Mr. Haessler: All right. If the Court please, may I have the letter, please?

Q. In this letter to which you made no reply, being Plaintiffs'—pardon me; Defendants' 4-F, Mr. Huncke makes the further suggestion saying, "I am sorry that we are unable [98] to give you any more definite or accurate information. It is our suggestion that you take off the quantities from the plans and base your production of material on the quantity which you believe will be required."

Now, did you do that?

A. No; because we had no experience in that kind of work and there was no way that we could take off the quantity. [99]

* * * * *

Q. Why didn't you send a reply to this letter advising Mr. Huncke that it would be his obligation under your understanding of the contract to furnish you with the quantities involved?

A. Well, because we had advised him prior to that on, I think, more than one occasion that it was his obligation which he agreed that he would furnish up the quantities and couldn't see where it

(Testimony of Marland G. Curtis.)

would do any good to keep repeating myself.

Q. You had advised him that it was his obligation under the terms of the contract?

A. That it was his obligation to furnish us the——

Q. That it was his obligation?

A. To give us the quantity that he wanted us to stock-pile.

Q. Well, in any event, you made no reply to this letter of Mr. Huncke's informing you you were required to produce all the ballast material required for the job and also directing you to make such take-offs as were necessary? [100]

* * * * *

The Witness: To the best of my knowledge the letter was not answered. [101]

* * * * *

J. G. SHOTWELL

produced as a witness on behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ratcliffe): Now, Mr. Shotwell, would you state your occupation?

A. I am what would be termed as an aggregate producer.

Q. Aggregate producer. And for whom are you employed? A. Well, I am self-employed.

Q. Self-employed. An aggregate producer, will you explain just what that means, aggregate producer?

(Testimony of J. G. Shotwell.)

A. Well, it's the mining of concrete aggregates, or, probably, ballast, that would be supplied to general contractors. It's a subcontracting business, you might say.

Q. Now, what is the name of your business?

A. Just J. G. Shotwell.

Q. How long have you been engaged in this business?

A. Since in the early '30's. Twenty-five years.

Q. I see. And in your experience as an aggregate producer—excuse me just a moment. In your business are you acquainted with contracts specifying needs; that is, producing all the concrete aggregates or other material required for a particular job? I mean, that is a common provision in construction contracts; is it not?

A. Yes, sir. [133]

Q. In your experience can you state whether or not where a contract provides that an estimated quantity of your product is to be produced by a designated date in stock pile—are you familiar with that type of contract?

A. Well, practically most supply contracts are more or less the same.

Q. In that type of contract is it the obligation of the buyer of the material, or of the seller,—that is, the producer of the material,—to finally determine the quantity that will be stock-piled?

A. Well, the producer would have no way to know. He'd have to get his information from the buyer, naturally.

(Testimony of J. G. Shotwell.)

Q. So, it's then your answer that it is the obligation of the buyer to furnish that information?

A. Yes, sir.

Q. In the custom of the trade, regular usage of the trade, when is that information furnished?

A. Oh, it would be furnished before the termination date, of course, because it would have to be furnished before the termination date.

Q. In your experience is it normal in these contracts to make these specific provisions in the contract that the buyer will so notify?

A. Well, it would be understood. It might not be in the contract, but it would have to be an understanding that he [134] would notify the producer because the producer has no way to go to the Army Engineers and find out. He is a subcontractor.

Q. Well, then, but is it normally in the contracts? You of your experience in the trade and experience with other parties, your knowledge in the trade, is it normal to set forth in the contract that the buyer will advise you of the amount required? A. Why, certainly.

Q. Is that language normally contained in the contract, written in the contract?

A. Well, it wouldn't have to be written in the contract, but it would be understood.

There would be no discussion about that. That would be just a fact according to the contract that you'd have to be notified.

Q. Well, if such language were omitted from the

(Testimony of J. G. Shotwell.)

contract, specific language omitted from the contract, in the trade it would be read into the contract; is that correct?

A. Oh, certainly. Certainly have to be.

Mr. Ratcliffe: That's all.

Mr. Ramacciotti: Just one second. That's all.

Cross Examination

Q. (By Mr. Haessler): You have testified, in other words, Mr. Shotwell, that [135] it's the obligation of the buyer or of the general contractor to let the man providing the subcontract or providing the aggregate know how much aggregate he is going to need before the contract has ended, before the contract terminated; is that correct?

A. Before the producer was finished.

Q. Yes. In other words, the producer—the buyer has an obligation to let the producer know before the contract is terminated how much aggregate he is going to need; is that what you say?

A. If I understand the question, yes. The purchaser would notify the producer how many tons or how many yards of material was necessary to complete what would be needed.

Q. And when does he have to—and he has to notify him before termination of the contract, is that correct?

A. Before he could finish his contract. If he had a terminating date, he couldn't terminate until he was notified exactly what tonnage he had to produce.

(Testimony of J. G. Shotwell.)

Q. Until he knew that he'd produce all that was required of him?

A. No. Produce the tonnage that would be required.

Q. Well, I think this is very obvious that you can't deliver gravel unless you know how much you are supposed to deliver. Is that the point you are trying to make?

A. Yes, that's the point I'm trying to make. You'd have to know, yes.

Q. All right. Is there any obligation in the custom of the trade for the buyer to notify before the contract is finished or before the buyer himself knows how much he is going to need?

A. Well, I don't understand that question.

Q. Well, you testified that the purchaser has to let the producer know before the termination—before the completion of the contract how much he is going to need because if he doesn't let him know the other man isn't going to know. If the producer doesn't know, he will never know how much to produce, when the contract will be complete. Let me rephrase that once more. You go into the job; it's the custom in the trade as you are producing gravel, it's the custom of the trade before the contract is finished to let you know how much gravel you have to supply, isn't that correct, or you can't supply it? A. Why, certainly.

Q. Now, is that what you are testifying to or are you suggesting something more?

A. No, I am suggesting that you might take a

(Testimony of J. G. Shotwell.)

contract to supply material for a certain building or certain dam but might not know exactly what you are supposed to supply before you start it because sometimes those quantities vary. But before your termination date you'd have to be notified that it was going to take so many tons to finish that job.

Q. Correct.

A. So you'd have to know how many tons to deliver, otherwise you'd have to wait to find out, unless the person that's buying the material from you tells you so and then you'd have to deliver it.

Q. That seems perfectly reasonable to me. In other words, at the time you start out the manufacture you may not know ultimately how much you are going to produce?

A. You'd have an estimated quantity which probably might vary and probably would vary.

Q. Does the amount that you produce generally vary somewhat from the estimated quantity?

A. Oh, I would say so, yes.

Mr. Haessler: I see. We have no further questions.

The Court: Redirect?

Redirect Examination

Q. (By Mr. Ratcliffe): Just to clarify that, Mr. Shotwell, it is your testimony, as I understand it—excuse me. It is the absolute obligation—the absolute obligation—did I stress that—of the purchaser to notify the producer of the quantity prior to

(Testimony of J. G. Shotwell.)

completion date; that is, prior to the time that that facet of the contract is to be completed? [138]

A. Why, certainly.

Mr. Ratcliffe: I think that's all.

Mr. Haessler: We have one further question. Is your Honor going to question?

The Court: No.

Mr. Haessler: We have one further question.

Recross Examination

Q. (By Mr. Haessler): With regard to your experience, Mr. Shotwell, have you produced ballast? A. Railroad ballast?

Q. For railroad jobs.

A. No, I haven't produced railroad ballast; no.

Mr. Haessler: Never. That's all. No further questions.

Mr. Ratcliffe: No further questions. [139]

* * * * *

MARLAND G. CURTIS

thereupon resumed the stand as a witness in behalf of Plaintiffs and, having been previously duly sworn, was examined and testified further as follows:

Cross Examination—(Continued)

* * * * *

Q. (By Mr. Haessler): You have testified that you actually produced 58,400 yards of gravel in the stock pile, is that correct?

A. That's correct.

(Testimony of Marland G. Curtis.)

Q. How did you produce that gravel?

A. Well, first you move a plant into—set up the crushing plant, and then you strip the quarry of the dirt.

Q. Pardon me. You what the quarry?

A. I say, you strip the quarry of material that is undesirable, dirt, trees, and then you drill the quarry and blast it and dynamite. [212]

Q. Did you use a coyote shot in blasting?

A. Yes.

Mr. Haessler: For the benefit of the Court, a coyote shot is——

Q. I think perhaps you are the better expert. Would you describe to the Court what a coyote shot is?

Mr. Ramacciotti: I think I'd be inclined to object to that as immaterial, irrelevant, and not proper cross examination.

The Court: Well, it may be interesting, but whether it is material or not is questionable.

Mr. Haessler: Our theory is this, your Honor: That the defendants used a coyote shot; that he estimated what gravel he would require at the time he ran the shot; that at the time he removed his crushing equipment from the ground we were going to ask him—he had used up all the gravel that was there. It would have been an expensive item for him to have done more. That goes to the motive of why he removed his equipment from the place.

The Court: Very well. You may proceed.

Mr. Haessler: Thank you.

(Testimony of Marland G. Curtis.)

Q. Would you tell the Court very briefly the distinction between a coyote shot and an ordinary shot or drill shooting?

A. What kind of drill shooting do you refer to?

Q. Well, please tell the Court what a coyote shot is. [213]

A. That's when you drill a small tunnel probably three or four feet in diameter back under the rock and then load it. Sometimes you tee off a time or two, depending on the shot, and then you put dynamite in and you plug it back up with sand and set it off.

Q. In other words, you shoot in a number of, several places at once; is that correct?

A. No. Usually maybe two.

Q. Maybe two? A. Three sometimes.

Q. Maybe more? How many places did you shoot in in this case?

A. I don't know. I wasn't never back in a coyote hole.

Q. Pardon me?

A. I don't know. I wasn't back in the hole.

Q. You weren't what?

A. I didn't go back in the hole. I don't know how many places we shot.

Q. Why did you use a coyote shot? Is it not a fact that a coyote shot is designed to bring down a fairly definable and substantial quantity of gravel at one time, or rock, so you don't have to keep having a succession of small shots?

A. You shoot——

(Testimony of Marland G. Curtis.)

Q. Please answer Yes or No and then explain.

A. I will answer Yes. [214]

Q. All right. Now you may explain.

A. No. Just skip it.

Q. All right. Yes. Is it not the fact that in using a coyote shot you estimate the amount of rock in advance of setting off the shot and place the holes accordingly? In other words, a coyote shot is designed to bring down a fairly closely estimated amount of rock, is that correct?

A. I would say No.

Q. How many shots did you set off at this rock pile?

A. I'm not sure whether it was one or two.

Q. You are not sure whether it was one or two. Was there any rock left that could have been delivered, or was there any rock left for crushing at the time you removed your crushing plant?

A. I would estimate probably in the neighborhood of 25,000 yards.

Q. There was 25,000 yards left. Was Mr. Thompson present when the drilling was done?

A. Yes.

Q. Or when the shots were set off?

A. Yes.

Q. Does he have more information on this question than you do? A. Yes.

Q. All right. I think we will leave that point. Now, do [215] you know of your own knowledge whether the material that was left in the rock pile, the reported 25,000 tons, was in a condition that it

(Testimony of Marland G. Curtis.)

could—could that material have been used in the crusher, or would it have had to be shot again?

A. Most of it could have been used in the crusher.

Q. Most of it could have been used in the crusher. Do you know that of your own knowledge?

A. I looked at it shortly before we quit crushing, and that's the way it looked to me.

Q. Shortly before you stopped crushing you looked at it? A. Yes.

Q. And in your opinion you could have used it in the crusher? A. Yes.

Q. Without further blasting?

A. Yes. Not all of it. Naturally, you have to do secondary shooting. We had to do secondary shooting throughout the job.

Q. All right. Oh. You testified on direct examination earlier today that the stock-piling would—was completed by December 22nd. You were then asked why you didn't meet the earlier date and you said that there was no necessity of meeting the date. What did you mean by that?

A. There wasn't any roadbed ready for the ballast and none of it had been used yet, so there wasn't any reason to work two shifts just to get it out of there and stock-pile it for next summer.

Q. I see. In other words, it wasn't required by the job by October 11th so that, there being no necessity, you just made a more leisurely—

A. We talked it over with Mr. Salm and he

(Testimony of Marland G. Curtis.)

agreed that it was all right if we went beyond the October 11th date.

Q. So you did so? A. Yes.

Q. Did you file any claim for extra compensation because you continued to produce beyond the October 11th date?

A. No. We did that for our own convenience.

Q. Now, you finished stock-piling by December 22nd. When did you dismantle your plant?

A. February.

Q. In February? A. Yes.

Q. When in February?

A. As near as I can remember, it was shortly after the 15th we started dismantling.

Q. Did you use the plant from December 22nd to February 15th? A. No.

Q. What did you do with the plant after you removed it on February 15th?

A. Most of it was moved into Spokane. Some of it we sold, some of it we moved later to other jobs.

It wasn't a plant that stays together; it was a [217] stick plant as you call them.

Q. How quickly was part of it used on other jobs? A. I couldn't begin to say when.

Q. You don't recollect?

A. I don't. There is no way that I could find out. There is too many parts to it. Maybe one electric motor might have went here today and there tomorrow. [218]

* * * * *

(Testimony of Marland G. Curtis.)

Redirect Examination * * * * *

Q. (By Mr. Ramacciotti): Let me start again on that question. In connection with [220] these other two railroad contracts, Mr. Curtis, did you procure or were you furnished with exact quantities as to the requirements of ballast?

A. Yes, we were before. [221]

* * * * *

Q. What were the terms of those two? Or, take one of those two contracts.

A. Well, the one we had for the Milwaukee Railroad, we were to stock-pile a given amount. I can't recall the amount of ballast. An estimated amount of ballast. And before we finished stock-piling the ballast they would measure the stock pile once a month and then they told us before we completed crushing exactly how many yards they wanted and we produced that much and that was the end of it.

Q. And was that notice as to the exact number of yards that they wanted given you before the date specified as the expiration date for the production of the ballast?

A. Yes. It was given to us before we completed the ballast, which was before the completion date of the contract.

Q. Now, the other one, was that of a same type or was there some difference?

A. The other one was with the Army Engineers and they specified an estimated amount to start with, and before we completed the job they had

(Testimony of Marland G. Curtis.)

given us the exact amount they wanted to stock-pile. [222]

* * * * *

Q. Now, that contract was prepared by the company that was [223] the prime contractor?

A. Yes. It was prepared by Mr. Huncke.

Q. That is true, likewise, of the subcontract in this case? A. Yes.

Q. In your cross examination, Mr. Curtis, you testified that you were not paid for the 58,434 yards of ballast that was produced but you were not asked why or by what computation you figured you were not paid. What is the fact as to how it happens that you were not paid?

A. Well, the money was—part of the money was withheld up from our final estimate on account of extra cost of obtaining ballast.

Q. That is the eleven thousand some-odd hundred dollars included in the first— A. Yes.

Q. Now, before you actually entered into and affixed your signature to the contract of the 10th of June with the defendant you did make an inspection, I think you say, some three or four hours, of the area where this track was to be located?

A. Yes. That was mostly at the quarry site.

Q. Yes. What type of an inspection did you make, Mr. Curtis?

A. We looked at the quarry to see what problem there was in crushing the rock and where we could stock-pile it.

Q. Well, did you at that time or at any time be-

(Testimony of Marland G. Curtis.)

fore entering into this contract start walking along the 16 miles of the [224] relocated line to inspect the texture of the soil or the condition of the ground?

A. No; because there wasn't any reason for it. There wasn't anything to be gained.

Q. You were not laying the track; you were having nothing to do with the placing of the track or its location?

A. Well, at that time most of the track where the track was to go was under construction. The roadbed wasn't completed in most of the way at that time. So we didn't know what it was going to amount up to when they got through.

Q. I think you made mention of the fact that when this contract was being considered your negotiations or discussions about it started along in March and terminated on the 10th of June of 1951. During that interval of time, during that period, there was a contract sent you by the defendants or by Mr. Huncke, I think you said, and it was returned for the reason that it was not in conformity with the discussions that you had had with Mr. Huncke with regard to an agreement.

A. That's right.

Q. And I believe you mentioned three different variations from your verbal understanding that appeared in the first draft prepared by Mr. Huncke of the contract. What were they, please?

A. The date—the completion date for Schedule A was May 1st and it should have been May 15th.

(Testimony of Marland G. Curtis.)

And, then, there were three [225] things that we had discussed that we were concerned about. That was one. Because, we couldn't even get in there by May 1st. And another was the possibility that slides would occur after the rail was laid and we didn't have any equipment that we could operate on the railroad. So I discussed that with Mr. Huncke and he agreed to furnish rail transportation if we had slides that required it at a price that would be equitable. And it was later confirmed by letter sometime later on, several months later, when it looked like it might be that we would have to use cars. The other thing was the quantity of the ballast.

Q. Now, with regard to the matter of the amount of ballast, just what was the discussion? What was said by each of you with reference to the amount of the ballast when you first had the discussion prior to the first draft of the contract?

A. Well, we wanted assurance from Mr. Huncke that he would advise us how many yards to stockpile by October 11th so we wouldn't have to cap the plant as well or be responsible for the quantity of ballast because we had no way of determining how much ballast it was going to take, actually.

Q. Now, the fact that the plant was detained there after that date and until the commencement of dismantling, which you say, I think, was about the middle of February—

A. February.

Q. —resulted in cost or expense to Curtis Gravel Company? [226]

(Testimony of Marland G. Curtis.)

A. Yes, it did. But we felt that we were obligated to keep the plant there until February 15th and we were trying to get information from Mr. Huncke as to what quantity of ballast we were to produce, if he wanted any more, or just what to do about it.

Q. Do you remember about when it was that you started work on this job; that is, starting in to move in equipment and actively engaging in parts of your job?

A. It was about the 1st of May when we started moving equipment in.

Q. At that time you had no written contract at all?

A. We didn't receive final signed copies of the written contract until, I believe it was, sometime in August.

Q. In other words, you had no signature of the defendants, or either of them, on any formal agreement until August of 19——

A. I believe it was August.

Q. And you performed in accordance with your verbal understanding, I believe, until that time?

A. Yes.

Q. Now, how much of your time was spent at the job site through the period from May until February of the next year? Were you there just periodically or did you spend time there for a day, and——

A. I was there periodically. I would say, probably, two [227] or three days at a time, maybe once every ten days or two weeks.

(Testimony of Marland G. Curtis.)

Q. I believe you testified that you had some conversations as indicated on cross examination about the matter of how much ballast. Did you ever talk with Mr. Huncke out on the site regarding that matter? A. Not that I can recall.

Q. Did you ever talk with Mr. Salm about it?

A. I talked with Mr. Salm, yes.

Q. Would you tell us about how many times you spoke with him and made requests?

A. Oh, as near as I can remember, about three times that it was discussed. [228]

* * * * *

Recross Examination

Q. (By Mr. Haessler): You testified with regard to the St. Paul Railroad contract and the other contract that you performed which had estimated quantities. You said it was the practice in those contracts for you to be furnished from month to month as you went along until completion the amounts that were going to be required; is that correct?

A. No, that is not correct. We were furnished month to month with the quantity that had been produced. [235]

Q. You were furnished month to month. What do you mean by had been produced? You were told how much you would produce each month?

A. Yes.

Q. You didn't know that of your own accord?

A. Well, no. They do the measuring in those contracts.

(Testimony of Marland G. Curtis.)

Q. Oh. But in each of those contracts were you informed at the beginning of the construction how much the estimated quantity in fact would be? In other words, if it said estimated 50,000 were you told it would not be 50,000 but actually would be 51,000?

A. Not at the beginning of the contract, no.

Q. Well, in other words, over the life of the job, I think is the phrase you used.

A. We were advised before we completed crushing the exact yardage that would be required.

Q. What determined the date on which you completed crushing?

A. Well, if we had a contract that was to be completed in a hundred days and it had 50,000 yards in it and in 50 days we had 45,000 yards, then we would assume that we would be done in four or five days from then and they would tell us they wanted some more crushed rock.

Q. Now, those were contract with railroads. What were they for, for the supply of ballast material? A. Yes. [236]

Q. Your obligations under the present contract went much farther than just supplying ballast material, didn't they? In other words, you had to be concerned with the grade because your obligation, you had to clear the right-of-way, prepare the roadbed, and do other things besides just supply gravel; is that correct?

A. We had to do some work on the roadbed, yes.

Q. So this, in other words, was a construction

(Testimony of Marland G. Curtis.)

contract rather than just a gravel supply contract; is that correct? A. That is correct, yes.

Q. All right. One or two more quick questions. Why did you feel you were obligated to keep your crushing plant on the site until beyond October 11th, 1952? You testified, in other words, that you felt obligated to keep it until February 15th. Why did you feel obligated to keep it past October 11th?

A. Because February 15th was the original completion date of our subcontract.

Q. There is nothing in the subcontract that refers to February 15th, is there?

A. Through reference to the main contract, yes.

Q. The completion date, that's what I mean. The completion date referred to you in your subcontract is October 11th, is that right?

A. On part of the work, yes. [237]

Q. All right. Now, one last item and we will be finished. Counsel asked you, followed up our question, of whether you had been paid for 58,600 and you have testified you hadn't and related it to the computations in your claim. Did you bill—did you figure your charge in this case or your claim on the basis of 58,600 yards of gravel or on the basis of 56,000?

A. Fifty-eight thousand-something.

Q. Six hundred. So you felt that that additional quantity was a part of the contract even though the contract had estimated quantity 56,000?

A. Yes. [238]

* * * * *

DAVID E. THOMPSON

produced as a witness on behalf of Plaintiffs, being first duly sworn by the Judge, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ratcliffe): Mr. Thompson, will you state your name? A. David E. Thompson.

Q. What is your occupation, Mr. Thompson?

A. I am a construction engineer.

Q. Where?

A. I am employed presently by Pacific Construction of Honolulu.

Q. During the period of the construction of the relocated Southern Pacific line down near Lowell, by whom were you employed?

A. By the Curtis Gravel Company.

Q. In what capacity? [239]

A. As Project Superintendent.

Q. What project was that?

A. That was the project as accomplished by Lookout Point Constructors wherein our work was a subcontract to that organization.

Q. During the period of employment there were you at the site? A. Yes, I was.

Q. As Project Foreman?

A. As Project Superintendent.

Q. Project Superintendent. Mr. Thompson, have you met Mr. Huncke and Mr. Salm who have been referred to in the testimony here?

A. Yes, I have.

Q. Will you tell us when and where you first met Mr. Huncke?

(Testimony of David E. Thompson.)

A. To the best of my recollection my first meeting with Mr. Huncke was in a hotel in Pasco where I accompanied Mr. Curtis. It was a meeting in Mr. Huncke's room one morning.

Q. Do you recall approximately when that was?

A. I believe it was in late March or early April.

Q. Will you tell the Court what matters were discussed at that meeting?

A. The purpose of the meeting was to discuss a proposed subcontract of the Curtis Gravel Company to Lookout Point Constructors. [240]

Q. In conjunction with the work at Lowell?

A. That is right.

Q. What matters were discussed in conjunction with this proposed subcontract?

A. The points that come to my recollection were some features of this proposed subcontract that we were concerned with. We knew that we were to be—going to be asked to sign a subcontract which bound us to certain portions of a general contract.

One of the problems that arose was the removal of slide material where railroad track had been installed. Our equipment was such that we had no way of operating on rail and no way of hauling that material. So we had discussed with Mr. Huncke the problem of dividing that work in such a manner that we would load and the general contractor would provide the hauling, disposing of the equipment.

The other item was the fact that we were—if we were to proceed with this contract we were to be

(Testimony of David E. Thompson.)

asked to meet a construction date which would be virtually impossible on one portion of the work. A completion date, I should say.

Q. What portion of the work was that?

A. That was the portion of the work known as Section A, or Part A of this subcontract of ours.

Q. For the sake of the record, what does Part A have to do with? [241]

A. It was the work on the north side of the river in conjunction with the railroad grade.

Q. What other matters were discussed?

A. The one other matter that I recall being mentioned was the request on our part for a determination of the final quantity of ballast to be made and a consent on Mr. Huncke's part that he would provide us with that information.

Q. Now, that was, you say, the consent of Mr. Huncke that he would provide. Can you spell that out in a little more detail? A. I——

Mr. Haessler: Before he spells it out, would you specify the time?

Mr. Ratcliffe: I thought we had done that.

Mr. Haessler: Would you tell me the time?

The Witness: To the best of my recollection it was in late March or early April.

Mr. Ratcliffe: It's a little difficult to hear you, Mr. Thompson. Would you speak a little louder?

Q. You were giving testimony regarding the request on the part of Curtis Gravel to furnish definite amounts of ballast material which would be required prior to completion date, is that correct?

(Testimony of David E. Thompson.)

A. To furnish us with a firm quantity of material prior to the completion date. [242]

Q. And Mr. Huncke's response to that request?

A. He indicated that he would provide us with that information prior to the completion of our work.

Q. Now, you used the term "indicated."

A. He stated or said or told us that he would give us that information later.

Q. Did he indicate at what time he would give you that information?

A. I recall no specific time mentioned except the point of discussion was that we would need it before we finished the stock-piling of the ballast.

Q. And at that time were you discussing the time the ballast was to be stock-piled; that is, the completion date for the stock-piling of the ballast?

A. The completion date for the stock-piling of the ballast was specific in the subcontract. The work was to be completed on or before October 11th.

Q. At that time that date of October 11th had been firmly established, is that correct? The subcontract agreement itself was not then in existence; that is, written out?

A. That's true. I don't recall whether the date had been established at that date or not.

Q. But in that conversation the matter of a completion date was discussed?

A. We were asking for a firm quantity prior to

(Testimony of David E. Thompson.)

the completion [243] date of the stock-piling of the ballast.

Q. After that time did you have any further conversations with representatives of Lookout Point Constructors regarding the matter of a firm quantity of ballast prior to the date you were to complete stock-piling?

A. I had one other casual or accidental meeting with Mr. Huncke which occurred at the service at Dexter one afternoon. Mr. Huncke and Mr. Salm were present when I met them.

Q. Do you recall approximately when that was?

A. I don't recall the date, but I believe it was before or close to the time that we began writing letters asking for a specific quantity. Our first letter, I believe, was of September 14th.

Q. To the best of your knowledge it would have been sometime in early September, is that correct?

A. To the best of my knowledge. I don't recall the date. I recall the meeting and the place and the parties. And again the matter of a firm quantity of ballast was brought up. Mr. Huncke was asked if and when he would provide it, and I was told that he would provide it at a later date.

Q. Mr. Salm, did he partake in that conversation? A. Mr. Salm was with Mr. Huncke.

Q. Actually at that time did Mr. Salm say anything?

A. Yes. It was a three-way conversation.

Q. But, I mean, which was it, Mr. Huncke or Mr. Salm, or both [244] of them, that gave you

(Testimony of David E. Thompson.)

the assurance that a definite quantity would be furnished?

A. I asked Mr. Huncke and Mr. Salm and I had had previous conversation regarding this point.

Q. Who gave the answer to your question?

A. Mr. Huncke gave me the specific answer.

Q. Now you mentioned having previous conversations with Mr. Salm regarding this matter. Will you tell the Court of those conversations?

A. I can only say that we had numerous conversations as we began to approach the estimated quantity of ballast as set forth in the general contract. We began to get more and more concerned about having a final firm quantity and it became a more and more frequent topic of conversation as we were becoming more pressed for this information.

Q. During the course of your stock-piling of this ballast did you run measurements of your own?

A. We had two methods of measurement for approximating the quantity that we had in the stock pile. We kept a load or vehicular measurement which we corrected with our own factors to estimate the comparable quantity that that would produce loaded in railroad cars. The other method was actual stock-pile measurement. We retained a crew, a party chief, a man by the name of Rutledge, who worked for the Corps of Engineers for a while and later, I believe, for Lookout Point Construc-

(Testimony of David E. Thompson.)

tors [245] to do this measuring for us. He was a competent party chief.

Q. Just prior to your cessation of stock-piling ballast what was your measurement as to the quantity?

A. In late November I believe it is shown in our daily job records, either November 22nd or November 24th, to the best of my recollection, November——

The Court: Did you have a diary on the job?

The Witness: Yes, we had a daily job diary.

The Court: I wonder where the diary is?

Mr. Ratcliffe: It's here in the courtroom, your Honor.

The Court: All right.

The Witness: I recall further, your Honor, that on November 24th we wrote a letter, I believe, to Lookout Point Contractors advising that the next day we were going to cross-section the stock-pile; that we made arrangements to do that; that we made that cross-section and then from then on we kept very careful vehicular measurement till the completion of the job. And on the basis of that cross-section plus the additional material deposited in the stock pile we determined our best estimate of the final quantity which was something slightly under 60,000 yards.

Q. Getting back to the conversation which you had with Mr. Huncke in early September, was there any written verification of that?

A. I do not believe we referred to that conver-

(Testimony of David E. Thompson.)

sation in [246] writing. But we did on September 14th write a letter, the last paragraph of which I believe was a request for a decision on the final quantity of ballast to be required.

I believe we made the statement that if no decision was forthcoming we would be governed by the quantity specified in the general contract.

Q. Did you get a response to that letter?

A. We got a letter in answer from Mr. Huncke—I believe the letter was dated September 22nd—wherein he advised he would provide us with the quantity within a period of two weeks.

Q. Was that—

The Court: Does anybody have that letter?

Mr. Ratcliffe: I think that letter is in evidence.

The Court: I remember now.

Q. (By Mr. Ratcliffe): At any time were you notified by Mr. Huncke or by representatives of Lookout Point Constructors that they were not going to furnish you this quantity?

A. Our first notification came following this previous subject we have been discussing. Our answer from Mr. Huncke resulted in a second letter of request from us, I think, in November, November 14th. Following that letter we had a reply from Mr. Huncke in his letter dated December 3rd wherein he advised that it was his opinion that it was our responsibility to determine the quantity of ballast. [247]

Now, I believe that was the first indication we

(Testimony of David E. Thompson.)

had that we would be required to determine the quantity of ballast.

Q. Now, on this matter of the ballast itself, will you please explain to the Court how you acquired the rock to make this ballast? There has been some testimony here regarding a coyote blast. Possibly you can start there and explain to the Court how you get this ballast.

A. Under the terms of the general contract I believe there are two quarry sites specified and, further, that the contractor has the option of finding other sites subject to the approval of the Government.

We elected to produce our ballast from a quarry site where a previous ballast contract had been executed. We did that because we thought there would be less risk in producing acceptable rock in a quarry where acceptable rock had already been produced.

In order to obtain the rock for the purpose of crushing it had to be loosened or blasted or removed from its in-place position. This particular quarry had been worked to some extent, and our problem was to obtain a quantity of rock necessary to meet our requirements from a high, sheer, vertical face. The most accessible and the easiest part of the rock was determined not acceptable by the Corps of Engineers inspection representatives. So in order to obtain a large quantity [248] of rock to produce this quantity of ballast we elected to blast or shoot this rock by the coyote method, which

(Testimony of David E. Thompson.)

consists of driving a small adit into the face of the quarry, going back a specified distance, and then laying out a shot or a blast in such a manner that you will produce the estimated quantity that you need.

In our case I believe we went back approximately 120 feet. On the back of the adit we teed out at right angles on the back of the adit at approximately 45 degrees. At a mid-point we teed off from this adit a distance of approximately 35 feet on each side. And these four ends of the tee sections added to the adit we placed quantities of powder, the total sum of which was about 19 tons. We connected these four deposits together by primer cord and back-filled the tunnel and detonated them all at once, producing one shot, which gave us the quantity of rock we required for the entire project.

Q. In moving this rock that has been blasted and getting that to your crusher what is the procedure there?

A. The procedure to handle that rock to the crusher was executed principally by the use of trucks and shovel. We had an extremely high face, over 200 feet of vertical face. It was necessary to work that deposit safely to benches in order—that is, to divide it into two elevations and work off two level portions, one the original quarry floor and [249] another one approximately half-way up the deposit of shot rock. That was necessary because the nature of this shot produced some

(Testimony of David E. Thompson.)

very large rock and boulders. And to work a vertical face of 200 feet in height would mean undercutting some of these large boulders with a shovel and risking the possibility that they would fall on the shovel or injure some of the personnel, or something of that nature.

So our procedure was to bench this quarry in two lifts.

Q. So that you ended up with a lower lift and an upper lift? A. That is right.

Q. And removed rock from both lifts?

A. That is right.

Q. What was the final date of the rock-crushing operation?

A. To the best of my recollection we stopped making rock on December 22nd.

Q. And on December 22nd how much rock was still available for crushing?

A. To the best of my ability to estimate it, it was about 20,000 yards. Our original estimate of the quantity of rock shot was 80,000 yards. That was not only my estimate but the estimate the party chief and the crew that cross-sectioned the quarry for us to determine the position of the adit and did our precision layout work for us.

Q. Is it customary, is it your practice and your experience [250] to shoot more rock than would be required for the job?

A. No. It is our custom to control that as closely as possible, considering, of course, that it is cheaper to shoot a little more than you need

(Testimony of David E. Thompson.)

than to, say, go back a second time and prepare a second shot.

In this case it was—we only made one shot. We had no experience record or no previous information on exactly how the rock in this quarry shot and we got more rock actually than I expected. We got more back break, as it's called, than I would expect. We had an unusually high quarry face.

Ordinarily a 210-foot face is not shot with one shot. But in this particular case it was the best we could do with the quarry site we had. [251]

* * * * *

Q. Mr. Thompson, were there any statements made to you by any of the representatives of Look-out Point regarding their own estimates as to the quantity of ballast that would be required?

A. I recall one conversation with Mr. Salm which I considered pertinent to this problem. He at one time—— [256]

Q. If I may, do you recall where and when that conversation was?

A. I don't recall when, but it happened, I believe, sometime between our letter of September 14th and our letter of November 14th requesting this specific figure. And the conversation took place in Mr. Salm's office. We were discussing this problem of ballast quantity and he advised me they were having difficulty in making a determination, and I believe that there were three parties in his organization that had made separate deter-

(Testimony of David E. Thompson.)

minations and had gotten three different answers. I believe, if I remember correctly, Mr. Salm said he had arrived at the greatest quantity of the three. And I recall this conversation later. It entered into my mind that this inability to agree on the quantity may have been one of the reasons why the responsibility or the attempt was made to place the responsibility on us.

Q. Mr. Thompson, how long have you been engaged in this type of work?

A. More or less since I graduated from school in 1941, with the exception of the time I spent in the Air Corps.

Q. How long were you in the Service?

A. Three years.

Q. Three years. That would be approximately eleven years actively engaged, is that correct?

A. Yes, sir. [257]

Q. In your experience during those eleven years in which you were actively engaged——

Mr. Haessler: Excuse me. For the record, if he wasn't actively engaged in this work while in the Air Corps, I think it doesn't total eleven years.

Mr. Ratcliffe: Oh.

Q. Did you say three years in the Air Corps?

Mr. Haessler: Pardon me.

The Court: I am sorry; I didn't hear.

Mr. Haessler: This job was in '51, wasn't it?

Mr. Ratcliffe: I am taking him up to the present time.

(Testimony of David E. Thompson.)

Q. You are still engaged in this type of work, are you not?

A. Yes, sir; in general construction.

Mr. Haessler: Pardon me.

Q. (By Mr. Ratcliffe): During the approximately eleven years you have been engaged in this type of work has it all been this particular type of work; that is, having to do with rock ballast aggregate and that type of thing?

A. It has not all been in that particular type of work. It has been all types of general construction work.

Q. All types of general construction?

A. I should not say "all" because that's not the proper work. But in many types of general construction.

Q. Mr. Thompson, how many years would you estimate you have spent in this particular type of work? [258]

A. You are speaking of production of ballast only or handling of rock and rock products?

Q. Rock and rock products.

A. I would estimate seven or eight years.

Q. Well, in your experience in dealing with rock and rock products can you tell us the general custom and the usage regarding the responsibility of a purchaser as opposed to the supplier of rock and rock products wherein the contract specifies an estimated quantity to be stock-piled by a given date, as to whose responsibility or obligation it is to determine the exact quantity that will be required?

(Testimony of David E. Thompson.)

A. Within the scope of my experience it is the responsibility of the buyer to determine that quantity. [259]

* * * * *

Cross Examination

Q. (By Mr. Haessler): Mr. Thompson, you have testified that there was a meeting between yourself and Mr. Huncke and other persons before the signing of this contract, at which Mr. Huncke stated that the defendants would furnish you with definite quantities required [260] for the job; is that correct? A. Yes, sir.

Q. Once again, when did that meeting take place, please?

A. To the best of my recollection, in late March or early April.

Q. Late March. Where did it take place, please?

A. The meeting took place in a hotel room in Pasco, Washington.

Q. Who was present at the meeting, if you please?

A. Mr. Curtis, Mr. Huncke, myself, and I believe for a short while that a Mr. Franco was there. I don't know.

Q. Who? A. A Mr. Franco.

Q. Thank you. What time of day was the meeting, do you recall?

A. I don't recall. I have a vague recollection that it was close to noon. I do not recall exactly.

Q. What was your understanding as to what he allegedly said he would do? Did you understand

(Testimony of David E. Thompson.)

that he would furnish you with the quantities you required before you commenced work on the job or as the job went along, or from time to time up to the completion date of the job?

A. It was my understanding that he said he would provide us with the quantity required to our completion of the crushing of the ballast. [261]

Q. Prior to what, please?

A. To our completion of the crushing of the ballast.

Q. By that did you mean prior to the date in the subcontract when you were required to complete it or prior to the time when the final gravel would be required for the job?

A. It was my understanding it would be prior to the date set forth as the date to be specified that the production of ballast would be complete.

Q. In other words, prior to October 11th, 1955?

A. Yes, sir.

Q. '51? A. Yes, sir.

Q. Pardon me. Was it your understanding, then, that the defendants were obligated under the contract, under the terms of the contract, to furnish you with exact information prior to October, 1951, as to the quantities required?

A. Yes, it was.

Q. It was your understanding that they were obligated under the contract?

A. It was my understanding—I beg your pardon. There is a difference. Are you asking me whether Mr. Huncke—it was my understanding

(Testimony of David E. Thompson.)

that Mr. Huncke assured us that he would or whether they were under the contract?

Q. Was it your understanding that the defendant was obligated under the agreement, the agreement embodying the writings and [262] anything else you thought constituted a part of it?

A. It was my understanding; yes, sir.

Q. It was your understanding that they were obligated to furnish you that, that it was not a matter—a matter of courtesy to you or of trying to help you out?

A. It was my understanding it was a matter of commitment.

Q. Matter of commitment and not a matter of courtesy. And the only written evidence of such alleged commitment, however, I take it, is the letter from Mr. Huncke to you dated September 21, 1951, which you refer to, in which—to refresh your memory I will read you:

“We appreciate your efforts to complete this work within the time allowed, and I assure you we will cooperate and give you any help which we can. We have as yet not made any calculations of the amount of ballast required other than the quantity as set out in the specifications of 56,000 cubic yards of ballast material. I have, however, requested that Mr. Salm and Mr. McDowell recalculate these quantities so that we can give you an accurate determination of the requirements for the work. This will be furnished you within the next two weeks.”

(Testimony of David E. Thompson.)

Now, is that the letter that you referred to as the written authorization from Mr. Huncke subsequent to signing [263] the contract which evidenced that he was committed to furnish you with the quantity?

A. That's the letter I referred to in my testimony. I believe there is one other letter in which Mr. Huncke acknowledges that he intended to furnish us with the final quantity of ballast, a later letter, I believe, April 14th or thereabouts.

Q. And is that in evidence?

A. That I don't know.

Mr. Haessler: Yes. If I may have it, that will be Plaintiffs' 2-G.

Q. Now, going back to the two letters—going back to these writings concerning the alleged commitment, this letter of September 21 from Mr. Huncke said this:

“We will cooperate and give you any help which we can.”

Did you send a reply to that letter advising Mr. Huncke that he was committed to give you the information?

A. We sent a reply to that letter again asking for the quantity. Our letter of November 14th.

Q. Did you take issue with the fact he said he would cooperate and give you help rather than saying that he was committed or obligated to furnish it?

A. That was a point I didn't consider in attempting to obtain the final quantity, whether it

(Testimony of David E. Thompson.)

was a matter of courtesy or commitment. [264]

Q. At that time, based on the prior alleged oral discussion, you just assume he was committed?

A. I assumed he was committed. I did not gather—perhaps I did not properly interpret that letter. But I did not actually realize that he did not intend to furnish us until his letter of December 3rd.

Q. If you had thought about those words and had realized or it had occurred to you that he meant this merely as a matter of cooperating with you and trying to help you, would you have written him a letter telling him he was committed?

A. I believe I would have then referred to the verbal agreements.

Q. I see. Thank you. Now, I would like to invite your attention to Mr. Huncke's letter of December 3rd, 1951, addressed to you, Mr. Thompson, wherein he says this:

“We have your letter of”——

The Court: What exhibit is that, please?

Mr. Haessler: Defendants' Exhibit 4-F, a letter from Mr. Huncke to the witness dated December 3rd, 1951.

Q. In this letter Mr. Huncke says:

“I am sure that by the terms of our agreement that Curtis Gravel Company is obliged to produce all ballast material required irrespective of the quantity needed. It is our thought that a very careful check of the quantity of material required

(Testimony of David E. Thompson.)

might reveal [265] an error in the specified quantity and as a matter of courtesy we intended to call any such error to your attention. It appears from our investigation, however,"—and so on.

"I am sorry that we are unable to give you any more definite or accurate information. It is our suggestion that you take off the quantities from the plant and base your production of material on the quantity which you believe will be required."

Now, that letter was addressed to you. Did you send any reply to that letter, informing Mr. Huncke that the defendants were committed to furnish ballast?

A. We replied to that letter by our letter of April 5th.

Q. Did you send any reply other than your letter of April 5th?

A. That was when I left the project.

Q. I see. In other words, you received this letter on December 3rd which, again, related that this matter was a matter of courtesy and this time it's merely spelled out in the letter and you sent no reply; you went ahead and dismantled your plant and pulled out and then months later you sent the letter of April 5th?

A. No, that is not correct, sir. We did not dismantle our plant at that time. [266]

Q. All right. Well, now, coming to your letter of April 5th which was your reply some four months later, this letter of April 5th sets forth the previous letters we have gone over reference

(Testimony of David E. Thompson.)

your letter and sets forth the letter of September 14th, a letter of September 21, the letter of November 24th, and a letter of December 3rd. In this letter in explaining on the matter of quantities you say this:

“We are not railroad contractors and have no experience in the application of ballast and the amount of shrinkage, loss and waste pertinent thereto; consequently we are unable to make a close determination from the plans. We recognize that we are obligated to maintain a plant for the production of ballast for the life of the original contract, which we did; however, our plant equipment without shovel and hauling equipment rents of approximately \$40 per hour, which should make it quite obvious we cannot maintain a plant at the project indefinitely without building up a very considerable sum for additional reimbursement.

“It is our opinion that we cannot reasonably be expected to make an exact estimate of the amount of ballast required. It is our further opinion that we did everything possible to obtain a final [267] quantity of material and that your organization was obligated to provide this information inasmuch as you established a completion date for ballast much earlier than the original contract completion date. It is also pointed out that we made approximately 4,000 cubic yards of ballast in addition to the contract quantities at the risk of receiving no payment for this material.

“It is now our opinion after reviewing the situ-

(Testimony of David E. Thompson.)

ation carefully that we are not obligated to produce any additional ballast.”

Well, now, referring to this letter, in this letter you refer to all the previous correspondence. This letter purports to reply, according to your testimony, to Mr. Huncke's letter of the 3rd stating that he was going to give you information on quantities as a matter of courtesy which is also—also the words “cooperate” and “help” appear in the letter of September 21. Why did you in this letter refer to the correspondence and make no reference to this alleged commitment from an oral meeting, a statement of Mr. Huncke?

A. I don't—I cannot give you any specific answer for that. I wrote what occurred to me as being pertinent at the time. We had asked already many, many times verbally, we had written two letters specifically requesting this figure, and [268] it was quite obvious to us that Mr. Huncke intended to refute——

Q. Intended to what?

A. Intended to refute any previous commitment he had made on that point.

Q. But why didn't you when he denied that commitment in two successive letters addressed to you as part of the correspondence, why didn't you—he negated any knowledge of any such commitment. He used the word “cooperate.” He used the word “courtesy” here. You write the letter, you state, a reply four months later, which purports to be a summation of all the evidence mate-

(Testimony of David E. Thompson.)

rial on the question and you do not make the assertion in this letter or in any other letters that there ever was a commitment based on this alleged oral understanding between you and Mr. Huncke. Aren't you a little surprised that, yourself—that if you had this thought in mind that you never wrote anything about it?

A. No, sir; I am not. I intended this letter to be a different approach. As I previously explained, it was obvious to me that Mr. Huncke intended to refute his agreement. We made the approach on the basis that we weren't qualified to make the estimate.

In other words, we attempted once more on another basis to get a figure or to appeal to Mr. Huncke to get this figure.

Q. All right. Going back to the earlier part of the cross [269] examination, you stated that if you had—if your attention had come to the words “cooperate” and “give you help” in this letter of September 21, so that if you had thought there was any possibility that Mr. Huncke was offering to give his suggestions or his advice or his determination of the matter as a matter of cooperation, that you would certainly have replied to that letter and reminded him of his commitment. Do you recall having testified to that a few minutes ago?

A. Yes, sir; I said that I would possibly have referred to the verbal commitment.

Q. I don't believe you said “possibly”; I believe

(Testimony of David E. Thompson.)

you said if you had been apprised you would have done so.

A. I believe I said I would have probably.

Q. All right. But, your answer was you just didn't notice the words in that letter. Then, I directed you to the letter of December 3rd in which it is spelled out again, which he states definitely he is doing as a matter of courtesy and again certainly you didn't feel it necessary to make any—your answer is you did make an answer on December 5th which purports to be an entire summation of the agreement on the part of all the parties. How do you explain your absolute silence, the complete lack of any written understanding whatsoever of this alleged oral statement of Mr. Huncke's in Pasco, Washington, which is at variance with the writing of the contract and from anything which appears in any correspondence or assertion?

A. Sir, the implication that that is a complete summation of the problem is yours and not mine.

Q. All right.

A. I did not refer to the other verbal discussions in the discussion that I had with Mr. Huncke at Dexter nor the discussions with Mr. Salm either. In other words, this was a new attempt at a different attack on their problem. It attempted to explain to Mr. Huncke that we did not feel that we were capable, one last attempt to get a figure.

Q. Wouldn't it have been reasonable when his letters indicated he was going to furnish you this information as a matter of courtesy to have written

(Testimony of David E. Thompson.)

to him and said, "You are obligated under our oral understanding independent"—"You were obligated under our oral understanding at that meeting at Pasco to give us the quantity"?

A. I don't feel that would have done any good, sir.

Q. You don't feel. Well, then, why did you feel that you would have replied to that effect to his letter of September 21 that you had noted the language speaking about "cooperating and giving you any help we can"?

A. I mean this interpretation comes after all the rest of this procedure. At that time I did not catch the trend or did I understand that he was going to renege on this commitment or my approach would have been different.

I did not actually understand that till after another [271] exchange of letters which ended in a similar——

Q. In other words, as I get your testimony, you did not question the words "cooperate" and "give you any help which we can" in the first letter. You did not write him back and say, "This isn't a matter of cooperation; this is a matter of commitment" because you didn't see the wording in the letter; otherwise you would have replied to that effect, so you told me.

A. No, sir; I don't believe I would because it was my understanding from that letter that he was going to provide us with the information within a

(Testimony of David E. Thompson.)

period of a few weeks and whether it was through courtesy or obligation it did not matter at that time so long as we got the information.

Q. And when did it become your obligation that he was not as a matter of commitment going to furnish you——

A. When I received his letter of December 3rd, then I understood.

Q. At that time why didn't you call his attention to this alleged commitment if it in fact existed?

A. This matter had been discussed, as I said, numerous times. Twice with Mr. Huncke and many times with Mr. Salm. And it resulted in several exchanges of correspondence and I felt it was hopeless.

Q. In none of which the commitment—didn't you think that it might have encouraged a reply; if you tell somebody you have [272] to do it under the terms of the agreement you are more apt to get a reply that if you say, "Please do it," aren't you?

A. I don't necessarily agree with you there. [273]

* * * * *

Q. Mr. Thompson, when was the plant dismantled?

A. Are you speaking of the matter of ceasing production or——

Q. No. I mean when was the rock-crushing equipment dismantled so the plant could no longer be operated?

A. May I answer and explain? I believe in

(Testimony of David E. Thompson.)

March, in about the middle of March. This plant was so maintained on the job that it could have been operated up until—with a small amount of work or comparatively small amount of work, or be put in operation at any time until the equipment was actually hauled away.

In other words, when we ceased production [274] of ballast we maintained a portion of our crew repairing and maintaining the plant in order to keep a level work load. And when you say dismantled, we removed some of the parts, engines and motors, to accomplish work. But nevertheless the plant could have been operated.

Q. Excuse me. When was the plant dismantled so that it could no longer be operated?

A. It would be in late March, I believe, before it would be past the point of operation again.

Q. In other words, you kept the plant there until late March?

A. Yes. In other words, we kept—we kept the substantial portion of the plant there so that it could have been reopened.

Q. I couldn't quite hear the last part.

A. We kept a substantial portion of the plant there so that it could have been made operable with a small amount of work in a short period of time.

Q. Now, was there a supply contract or a construction contract, your subcontract?

A. To the best of my understanding of the contract, we had both features in our subcontract.

(Testimony of David E. Thompson.)

Q. Both construction and supply?

A. Yes; the Item B, the furnishing of ballast, was, in effect, a supply item. [275]

* * * * *

Q. Well, let me ask you one last point: When did you first determine in your mind that Mr. Huncke and the rest of the defendants were not going to furnish you with exact quantities required on the job prior to—were not going to prior to—let me rephrase that question. When you received this letter of December 3rd from Mr. Huncke addressed to you in which he stated that you were required to produce all the ballast needed for the job and that as a matter of courtesy the defendant was going to—as a matter of courtesy the defendant intended to call to your attention any obvious error in requirement, did you believe after reading that letter that they were going to furnish you with accurate determinations of the ballast required at that time?

A. The receipt of that letter was the first time that I actually understood that they did not intend to provide us with the quantity, if that is what you are getting at.

Q. All right. This is the first time you fully understood it? [278]

A. This is the first time I fully and completely understood that we were not going to get the quantity from him.

Q. Is it your understanding that they would

(Testimony of David E. Thompson.)

never furnish you with a quantity or that they would merely furnish you with their needs as the job went along?

A. As I recall, I formed no conclusion in that vicinity. I did try once more in a letter of April 5th to get an answer again.

Mr. Haessler: We have no further questions, your Honor.

The Court: Redirect.

Mr. Ratcliffe: Counsel, is this letter of April 5th that you have read from, has that been offered and admitted?

Mr. Haessler: Yes. That's your exhibit. Every letter I have read from is in evidence.

Mr. Ratcliffe: I just wanted the number.

Mr. Haessler: Your No. 2. Yes, Plaintiff's No. 2.

Redirect Examination

Q. (By Mr. Ratcliffe): Mr. Thompson, I think there was some comment regarding the matter of completion of the stock-piling in the subcontract being specified as October 11th, 1951; is that correct? A. Yes, sir; on or before.

Q. When was the stock pile actually completed?

A. We ceased production of ballast December 22nd. [279]

Q. Between these dates or sometime prior to these dates were any discussions had with representatives of Lookout Point Constructors regarding the completion date?

A. Yes, sir. The conversation was with Mr.

(Testimony of David E. Thompson.)

Salm. The point was that we were operating, I believe, in September on a two-shift basis and in an attempt to make the ballast by the specified date in our subcontract, and it was apparent at that time that they were not going to need the ballast or need all of the ballast as early as they had previously anticipated. With that in mind we requested that we be given permission or be given their verbal blessing to extend this time a little for our own convenience. And Mr. Salm advised me that he could see no reason why there would be any difficulty if it took several more weeks to finish the production of ballast. And so we, I believe, around the 1st of October went back to a one-shift operation. It was solely for our convenience and their courtesy to us.

Q. While you were on this job were there ever any complaints made on behalf of Lookout Point that they were being delayed or urging you to hurry and finish your stock pile?

A. I believe Mr. Huncke wrote one letter criticizing the speed at which we were producing ballast early in the—early in the production of the ballast. But I believe by this time that he, too, was satisfied.

This is merely my opinion, since I did not talk to [280] him about it specifically. But I did talk to Mr. Salm and he was satisfied that we would complete it in such a manner that they would neither be delayed or damaged or inconvenienced in any way. [281]

* * * * *

DOUGLAS SALM

produced as a witness on behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Ramacciotti): Mr. Salm, you were, according to the stipulation in this case, one of the representatives of the defendants at Lookout Point?

A. That is correct.

Q. Do you recall when it was that you started your work there? A. June of '51.

Q. Do you remember when your work ended and you left? A. August 15th, '52.

Q. Now, during that time what was your official capacity or your title or your designation?

A. Superintendent.

Q. During that time, as I understand the claims and contentions here, there was certain ballast brought to the job site from Springfield?

A. That is correct.

Q. Do you remember about when that was?

A. I believe during the month of June.

Q. June of 1952? A. '51.

Q. '51? [288] A. Yes, sir.

Q. Are you sure of that?

A. If I understood your question—what was your question again, please?

Q. The question was when the ballast was brought to the job site from Springfield, from the independent suppliers at Springfield.

A. Well, there was two parts, of course. Part A we got ballast from them and also Part B.

(Testimony of Douglas Salm.)

Q. Well, there is a contest here of the question as to the cost of bringing ballast from Springfield to complete——

A. Oh. That was Part B.

Q. ——Part B, yes.

A. Yes.

Q. Now, when did that ballast come?

A. That ballast shipment began, I believe—I believe it began the latter part of May or first of June of '52, maybe a little later. I don't recall the exact date at this time.

Q. Did you procure that ballast or make arrangements for it?

A. Yes.

Q. At Springfield Sand and Gravel Company?

A. That is correct.

Q. It was brought by railroad; that is, by Southern Pacific to a certain point, was it not?

A. To the Jasper switch.

Q. To the what?

A. To the Jasper switch.

Q. To the Jasper switch?

A. On the new construction.

Q. That is the terminus or that was at that time the terminus of the railroad's property?

A. That was the connecting point of the new construction to the existing S. P. line.

Q. In other words, at that switch the new construction work took over and the track ran along that end under construction?

A. That is correct.

Q. The relocated line of the Southern Pacific?

A. Yes.

Q. The cars and the motive equipment, the

(Testimony of Douglas Salm.)

engines, that brought the ballast from Springfield, brought it to the switch and left it there; isn't that correct? A. That's correct.

Q. Then it was picked up by the equipment of the defendant company by their engines and their own cars? A. (Witness nods head).

Q. As a matter of fact, the movement from Jasper was entirely—that is, after the cars and the ballast reached Jasper it was entirely upon the relocated line?

A. It was on the relocated line but not on [290] our portion of the construction.

Q. But it was on the——

A. It was on the relocated line.

Q. It was on the relocated line of the Southern Pacific? A. Yes.

Q. As referred to in the contract we are talking about? A. Yes.

Q. Now, was the Plaintiff's quarry and crushing equipment on your portion of the line as you referred to it?

A. No. It was on the portion constructed by the Utah Construction Company. [291]

* * * * *

L. W. HUNCKE

produced as a witness on behalf of the Plaintiffs, being first duly sworn by the Clerk, was examined and testified as follows: [292]

* * * * *

Redirect Examination—(Continued)

Q. (By Mr. Ramacciotti): You, likewise, pre-

(Testimony of L. W. Huncke.)

sented a claim to the Corps of Engineers in connection with the extra cost of ballast, did you not?

A. Yes, I did.

Q. Talking about all of the claims that you submitted? A. Yes, sir.

Q. And that was a claim for some nine thousand-odd dollars? A. Substantial claim.

Q. And that is the amount that represents a part of the withheld moneys from the amount due to the Curtis Gravel Company, isn't that true?

A. No. We don't consider that as being withheld moneys. It was the cost of finishing Curtis Gravel Company's work.

Q. Well, now, in the Agreed Facts in the pre-trial order in this case, Mr. Huncke, it is recited that you procured certain 12,000 cubic yards of ballast at Springfield, to which cost you added the transportation charges, or some charges for transportation, making a total of a certain amount, [309] deducting therefrom the amount that would have been paid Curtis Gravel Company had that same amount of ballast been furnished by Curtis Gravel Company, and the difference or net was \$9,872.70; that's correct, isn't it? A. I believe it is.

Q. Now, you withheld that sum from the amount due Curtis Gravel Company on your final statement to them when you made your final remittance under the contract?

A. We charged their account with that amount of money.

(Testimony of L. W. Huncke.)

Q. You charged their account and withheld that amount of money?

A. We charged their account.

Q. And withheld it?

A. Certainly. It was a debt account.

Q. And then having taken it from moneys that would otherwise be due Curtis Gravel Company, you then proceed to make a claim on the same item, the same amount, against the Corps of Engineers?

A. I believe that's substantially correct.

Q. And you did that in your behalf, likewise?

A. Yes, sir.

Q. Seeking double payment, is that correct?

A. No, sir.

Q. What? A. No, sir. [310]

* * * * *

L. W. HUNCKE

produced as a witness in behalf of the Defendants, having been previously sworn by the Clerk, was examined and testified as follows:

Direct Examination

Q. (By Mr. Haessler): Mr. Huncke, you are the President of the William H. Smith Contracting Company of Missouri, is that correct?

A. That's correct.

Q. Will you please advise the Court of the circumstances and the background giving rise to the events which took place leading up to the consummation of the contract between yourself and between the defendants and the plaintiffs in this case?

(Testimony of L. W. Huncke.)

A. The Curtis Gravel Company was contracting with Smith Contracting Company on a job at McNary Dam about the time we acquired the work at Lookout Point. They had just finished producing ballast and we knew them slightly and we asked them to bid along with three or four other contractors in the Portland area on a portion of the work which we decided to have performed by subcontract on our Lookout Point job.

I believe that we asked Mr. Curtis to give us a bid about the middle of March. Shortly thereafter, within a week, we received a bid from Mr. Curtis, and subsequent to that bid we had a conversation concerning the work to be done and we had conversations at that time with other contractors.

We prepared a subcontract based on Mr. Curtis' bid [312] and based on the requirements of the contract—general contract—that, I believe, was submitted in early April.

Mr. Ramacciotti: What was the date, please?

The Witness: Early—I would say about the 10th or 12th.

Mr. Ramacciotti: Of April?

The Witness: Something like that; within a very few days, I believe. It was about the 15th of April Mr. Curtis called me on the telephone and said that the subcontract agreement differed in some respects with his proposal, particularly having to do with a small item as asphaltting a bridge structure and also having to do with the completion date on a section of the work which he considered to be relatively impossible and on one or two other

(Testimony of L. W. Huncke.)

very small items of work or language. We agreed with him that the changes that he suggested were in order and that we would make those changes. And I believe on the 22nd or 24th day of April we forwarded Mr. Curtis a revised subcontract. The two subcontracts were identical in their general scope and the general requirements, quantities and prices, but there were certain differences that he had asked us to incorporate in the revised contract and we incorporated those without further discussion with him.

We didn't receive the contract back immediately, and I have a notation in the file that we called Mr. Curtis approximately on the end of April asking that he return the signed document. And the notation shows that he had had some [313] personnel difficulty which precluded him from at the moment getting the performance bonds or payment bonds or executing the contract and it would be slightly delayed, but it would be forthcoming. In May, I believe, Mr. Curtis went to work and he started on what we call the north side of the Willamette River; that's in an isolated spot. His work involved only the roadbed topping and his work was dependent upon the progress of another contractor. And it was work which was somewhat isolated. And, although the Government was in a hurry to get it, they hadn't provided the area for the other contractors to work in so there was some delay in accomplishment of that work. But I believe it was fully accomplished in June.

(Testimony of L. W. Huncke.)

About the same time, or possibly in June, I think, Mr. Curtis went to work on the left bank or the major portion of this contract. To what extent he went to work I don't know. But I think the record shows that he started to work, started to open up a quarry or to follow the Utah Construction Company in the quarry that's now known as Quarry Site B. I don't have much knowledge of what transpired on the work until, I believe, about the end of August, other than from looking at daily reports and other information given me by our superintendent. It appeared the work was going very slowly and sometime, I believe, in the latter part of August or first part of September I made a trip to Lookout Point site. [314]

I looked over the site and the work that was accomplished and the progress of other contractors which affected our progress and I had a conversation, a very brief conversation, with Mr. Thompson who represented Curtis Gravel Company at that time. The principal subject of discussion was the progress in getting roadbed topping on the subgrade as rapidly as it was turned over to us by the Government. Our progress in that regard had been very slow and they assured me that they either had entered into an agreement or they would enter into an agreement with another contractor at Meridian to take over a portion of the roadbed topping work or to produce the material for the roadbed topping.

(Testimony of L. W. Huncke.)

I left very shortly thereafter. I only, probably, talked to Mr. Thompson half an hour at the most and left. I don't know whether I was back on the Lookout Point job again or not, but I might have been on the Lookout Point job during the winter.

My touch with the job was through our reports and Government reports to us. I knew in general what progress was being made by our company as well as our subcontractors on the work. I had some general ideas of the progress being made by others and the problems in general, but I was not at the site.

About early spring of the following year, 1952, I was informed that Mr. Curtis was going to dismantle and [315] move his plant. I had been informed by the Corps of Engineers that he had taken this action or started this action in January. And in conversation or in some discussions with their representatives I understood that what they had done in January was to remove the power plant, probably for overhaul. So that I knew along about February they were moving this plant. And I believe that I was informed that they would move it in its entirety, I think, the first week or so of March. I wrote Mr. Curtis at that time. And I had previously either written or discussed with him the obligations of the Curtis Gravel Company under our subcontract and the problem that they faced if they moved this plant and had not produced a sufficient stock pile of material which would meet the specifications.

(Testimony of L. W. Huncke.)

There was always the thought in my mind that the material that they had manufactured——

Mr. Ramacciotti: I object, if your Honor please, to such thoughts as he might have personally on some subject that's not related.

The Court: Yes. The Court acknowledges that this is just the witness' statement about it.

The Witness: I was just going through it as thoughts occurred to me. I can proceed, anyway.

Mr. Haessler: You continue, please, and don't advise the Court as to what you thought but as to what you said and did, if you would, please, the facts given you. Give the facts. [316]

A. I wrote Curtis Gravel Company and told them that I had no——

Mr. Ramacciotti: Mr. Huncke, could you fix the date of this?

The Witness: I would say it was early March.

Mr. Haessler: If the Court please, I will hand the witness Defendants' Exhibit 4-K.

The Witness: This is dated March 14th. At this date I understand that they had completely dismantled their plant. We had no objections to them dismantling their plant, provided they recognized their obligation to produce the requirements for the work. And, in fact, I had never insisted that they place a crushing plant on the job because their obligation was to produce——was to furnish us crushed stone ballast meeting the specifications in railroad cars, and just how they went about it was no concern of ours. So that the fact

(Testimony of L. W. Huncke.)

that they moved their plant was, as far as I was concerned, within——

Mr. Ramacciotti: Now, if your Honor please, the witness is testifying to what was all right as far as he was concerned and not narrating facts or actual communication between the parties. It's mostly just a personal feeling about the things.

Mr. Haessler: I will confine the questions, make the questions not so broad. I think that would eliminate it.

Mr. Ramacciotti: I think that would. [317]

Mr. Haessler: I was trying to save time.

Q. At the time you wrote the letter of March 14th was the plaintiff performing under the subcontract at that time? Were they doing work under the subcontract on March 14th, 1952?

A. Yes.

Q. What work were they doing?

A. Well, as far as I know,—the records will show—they were moving slides, perhaps doing roadway shaping, fencing, or whatever the obligations of the contract were. I don't know exactly what work they were doing.

Mr. Ramacciotti: I move that the answer be stricken. In the first place, the answer was "As far as I know," they were doing this and that and the other. And then he ends up by saying, "I don't know just what they were doing, so I think——"

Mr. Haessler: You make strike the answer.

The Court: I acknowledge the witness is not speaking from personal knowledge.

(Testimony of L. W. Huncke.)

Q. (By Mr. Haessler): Mr. Huncke, I hand you herewith a document which has been admitted in evidence as Change Order 23 and that document has been identified and admitted as our Exhibit 8-D, being Change Order 23 dated June 10, 1952.

A. Yes.

Q. I ask you to examine that document and in that document [318] you will find a reference setting forth the completion date of the contract as August 10th, 1952. Were there any extensions of the completion date beyond the date set forth in that change order?

A. I don't believe so. I believe this was the completion date.

Mr. Ramacciotti: If your Honor please, there is no question but what the date shown and referred to is, perhaps, an expiration date of a contract as a result of an extension that was worked out between the defendant and the Corps of Engineers, without the knowledge of the plaintiff or independently of the plaintiff. But the thought that I have in making this comment and objection is that the original contract did not expire on that date. That is the date of an expiration resulting from further negotiations between the Corps of Engineers and the defendants.

Mr. Haessler: Are you making an objection or a comment?

Mr. Ramacciotti: I say, this is immaterial.

Mr. Haessler: You are stating that the question is immaterial?

(Testimony of L. W. Huncke.)

Mr. Ramacciotti: Yes.

Mr. Haessler: It is our position, your Honor, that the completion date of this contract is August 10th, 1952. It is our position and has been from the first that we were obligated to do all the work specified by the contract. [319]

The Court: I understand your position. You may proceed.

Mr. Haessler: All right. Thank you.

Q. I now hand to you a document identified as Change Order No. 5 which we have listed for purposes of identification as our Exhibit 8-A. Will you examine that, please? Does your signature appear on that change order, Mr. Huncke?

A. Yes, sir.

Q. Can you identify that document as being in fact Change Order No. 5 issued by the Corps of Engineers in connection with this contract?

A. Yes, sir.

Q. Does that document, that change order, refer to an extension of time for performance of a part of the contract on June 10th, 1952? A. No.

Q. June——

A. The change order recites the reasons for delay and extends the time for completion of performance of Part A to 9 August, 1951.

Mr. Haessler: Thank you.

Mr. Ramacciotti: 9th of August?

Mr. Haessler: 9th of August, 1951. That's Part A of the contract.

(Testimony of L. W. Huncke.)

If your Honor please, I should like to offer that in evidence at this time. [320]

The Court: Any objection?

Mr. Ramacciotti: No, your Honor.

The Court: It will be received.

(Whereupon the document entitled "Change Order No. 5," previously marked for Identification as Defendants' Exhibit 8-A, was thereupon received in evidence.)

Mr. Ramacciotti: If your Honor please, I think that I will, if I may, please, withdraw my consent to the admission of this change order for the reason as pointed out by Mr. Ratcliffe, that we were not a party to it, knew nothing of it, and had no contact with anyone who had passed on to us the substance of it or the context.

The Court: Do you intend to link it up with the plaintiffs?

Mr. Haessler: We intend to link it up in this manner, your Honor: That this was an extension of Part A of the contract. We have previously submitted Change Order—an extension of Part B, a change order on that, and it is our position the plaintiff has attempted to create the erroneous impression that there was a completion date of this contract on February 16th. The sole basis of that is a provision in the general contract which sets forth various parts of the contract with various dates, under various times, when we were expected to complete those parts. This relates to Part A. The previous [321] change order relates to Part B.

(Testimony of L. W. Huncke.)

We are offering it to show the duration of the contract as a matter of the length of time it requires us and our subcontractors to perform and that these dates set in were regularly extended by the Government so that there is no significance as to whether or not the work was performed before or after a certain date once an extension was granted.

The Court: Well, is there any issue concerning penalties or anything of that nature?

Mr. Haessler: The only issue is the fact that the witnesses for the plaintiff and counsel for the plaintiff, I think they are going to try to urge the contention that the completion date of the contract was February 16th. The point is that we contend there is no basis for that and that this document is illustrative of that fact.

In other words, the completion date of this contract is when we get our work done; that there were various parts of the work had to be performed by a given date unless extensions were granted for that work and the contract itself makes provisions for those extensions. And we want to show that extensions were granted regularly, both before and after February 16th, relating to various aspects of the contract.

The Court: Let me see that a minute, please. Well, I want you to have your theory in the record so it will be [322] received along with your theory on it.

Mr. Haessler: Thank you, your Honor.

(Testimony of L. W. Huncke.)

The Court: This order extends the order.

Mr. Ramacciotti: May the record show, if your Honor please, that we were not, so far as the evidence thus far discloses, not apprised. We made our contract in June on the basis of the prime contract of January, 1951, and we relied upon that and did not have any part in any extensions of time.

The Court: I understand that.

Q. (By Mr. Haessler): Mr. Huncke, several witnesses have testified to the existence of an oral understanding creating a commitment on the part of the defendants allegedly the result of statements made by yourself in Pasco, Washington, under which you agreed to furnish them with advance information as to the quantities of ballast which would be required for the job. Were there any such commitments on your part?

A. No, there was not.

Q. Were there any reasons why it would be impractical or impossible for you to give such a commitment?

Mr. Ramacciotti: Wait just a minute. I object to that question as being in the realm of speculation.

The Court: Yes. Well, it calls purely for a conclusion of this witness, "Is there any reason why it would be impossible?" Why don't you ask him what his reasons were? [323]

Q. (By Mr. Haessler): Would you have been willing to give such a commitment at that time?

Mr. Ramacciotti: Objected to as immaterial.

(Testimony of L. W. Huncke.)

The Court: Yes. It will be sustained. This witness certainly can say without argument whether he did or did not make such commitment.

Q. (By Mr. Haessler): Would it have been possible for you to furnish the plaintiffs with advance information as to the precise amount of ballast required?

Mr. Ramacciotti: Objected to as incompetent, irrelevant and immaterial, and for the further reason that the witness testified that he was at the situs of this work on two occasions and that his absence was throughout the entire course of the work with the exception of those two times. Now he is asked whether or not it would be possible for him to do something and I think it is wholly immaterial for the statement of the record.

The Court: It will be sustained.

Q. (By Mr. Haessler): Were you asked to give a commitment as to agreement at this meeting in Pasco; were you asked to give a commitment that you would furnish advance notice of these quantities of ballast that would be required on the contract? A. Not to my knowledge.

Mr. Ramacciotti: What is that? [324]

The Witness: Not to my knowledge.

Mr. Ramacciotti: Not to your knowledge?

The Witness: That's right.

Mr. Ramacciotti: That is, you don't remember?

The Witness: I do not remember that.

Mr. Ramacciotti: Do not remember. All right.

(Testimony of L. W. Huncke.)

Q. Mr. Huncke, the Bailiff has just handed you Plaintiffs' Exhibit 2-B, dated 9-21-51. Will you read the last paragraph of that letter, if you please?

A. "We appreciate your efforts to complete the work within the time allowed and I assure you that we will cooperate and give you any help which we can. We have as yet not made any calculation of the amount of ballast required other than the quantity as set out in the specifications of 56,000 cubic yards of ballast material. I have, however, requested Mr. Salm and Mr. McDowell recalculate these quantities so that we can give you an accurate determination of the requirements for the work. This will be furnished to you within the next two weeks."

Q. Did you make that offer as a matter of courtesy?

Mr. Ramacciotti: Just a moment. I object to that as immaterial, what prompted the writing of the letter by this witness, whether it was courtesy or otherwise. [327]

The Court: Well, of course, to ask the witness was it a matter of courtesy is merely a matter of asking for a conclusion. Purely a leading question. Ask him why he wrote it.

Q. (By Mr. Haessler): Why did you write that letter, Mr. Huncke?

A. We attempted to be helpful to these people.

Q. Did you make—pardon me. Are you finished?
A. Yes, sir.

(Testimony of L. W. Huncke.)

Q. Did you make an effort to assist the plaintiff by giving them—by obtaining advance information as to the amount of gravel which was to be required for the job?

A. Read that, please?

Mr. Ramacciotti: Would you read that question back to me, please?

Mr. Haessler: I will rephrase the question.

Mr. Ramacciotti: I object to the question.

The Court: Counsel said he would reframe it.

Mr. Haessler: I will rephrase the question.

Q. Did you make any effort to determine in advance the quantities of gravel which would be required for the job?

Mr. Ramacciotti: Objected to as immaterial. If the witness were asked what he did, that would call for an answer that would be of some value.

The Court: He can answer that Yes or No and then [328] explain.

The Witness: I would like to know what you mean by advance. Of what? You mean in advance of that letter or later?

Mr. Haessler: Did your organization make any effort to determine the quantities after you sent that letter?

Mr. Ramacciotti: Objected to as calling for a conclusion and opinion of the witness. He could be asked what he did.

The Court: He can answer that Yes or No. He either did or he didn't.

The Witness: Yes.

(Testimony of L. W. Huncke.)

Q. (By Mr. Haessler): What did your organization do in an effort to determine——

Mr. Ramacciotti: I think this calls for speculation. He was only there twice, if your Honor please.

Mr. Keane: If the Court please,——

Mr. Haessler: He is the President of the organization, and I think the Court can take judicial notice that the president of an organization doesn't have to be physically present in order to know everything that is accomplished.

Mr. Ramacciotti: I contend that if he learned of things that were done in connection with this matter of making an effort to determine the amount of ballast required, it would be that he would be informed by hearsay. If there are letters [329] that bear out any contention or statement that he makes in that regard, the letters would be the best evidence; otherwise, if he was merely told, it is hearsay evidence.

The Court: Well, we don't know what the witness is going to testify to.

Mr. Ramacciotti: Well, we don't as yet; that's true, your Honor.

The Court: You may answer the question.

The Witness: Would you read it to me, please?

(Whereupon Mr. Haessler's last question to the witness was read by the Court Reporter.)

The Witness: Our superintendent made an appraisal of the requirements of the work by reference to other work that had been performed on that

(Testimony of L. W. Huneke.)

job by other contractors. Our Kansas City office made an analysis, an arithmetical analysis of the quantities required and our Los Angeles office did likewise.

Mr. Ramacciotti: I wonder, if your Honor please, at this point if we could ascertain when those analyses were made?

The Court: Can you supply that?

The Witness: Those analyses were made after the letter was written, and I can't state the exact date, but I would say October and, perhaps, November, 1951. [330]

Q. (By Mr. Haessler): Did you make any analyses before the letter was written?

A. I made none.

Q. Did you direct that any be made before the letter was written?

Mr. Ramacciotti: Objected to as immaterial. If there were none made, what difference does it make whether he gave directions?

The Court: Well, perhaps I misunderstood the question.

Mr. Haessler: I withdraw the question.

(Whereupon Mr. Haessler's last question to the witness was read by the Court Reporter.)

The Court: He may answer that.

The Witness: I know of none that were made.

Mr. Haessler: All right.

Q. Did your organization reach an accurate or a satisfactory determination of the amount of ballast that would be required for this job as a

(Testimony of L. W. Huncke.)

result of your investigation of the requirements made following the sending of the letter?

A. No.

Q. Why not?

A. It was decided after the various calculations and conclusions had been drawn by the superintendent that the matter at that time was indeterminate. [331]

Q. Why was it indeterminate?

A. We had no knowledge of the conditions of the subgrade that might exist at the time the work was actually performed. The Curtis Gravel Company subcontracted the roadbed topping and they were in a much better position to know of those conditions than we were. And, accordingly, we could give no better information that what was contained in the original contract.

Q. Who was obligated to prepare the subgrade under the subcontract? Was plaintiff or the defendant obligated?

A. I'd say in general neither. That is, there is an item for subgrade, reshaping, which work was performed by the Curtis Gravel Company. And in areas where they would perform subgrade reshaping in that sense they would prepare the subgrade. The subgrades primarily were prepared by other contractors; that is, other general contractors, except in the locations where Curtis Gravel Company prepared or placed the roadbed topping. And I presume in those areas we would conclude

(Testimony of L. W. Huncke.)

that he prepared the subgrade to the extent of the roadbed topping.

Q. When was the last of the subgrade ready to have ballast applied to it?

A. I have no knowledge of that. It's in the record, I think.

The Court: Mr. Haessler, may I interrupt?

Mr. Huncke, did your firm actually apply the ballast? [332]

The Witness: Yes, sir.

The Court: You didn't have a subcontract for the letting of that?

The Witness: No.

The Court: Do you know whether or not there are any reports either? I assume that your firm kept a diary on the job. Do you know of your own knowledge whether there are any reports in the diary concerning the experience that you were experiencing as you progressed down the line in applying the ballast? What I have in mind is whether it was meeting your estimate and your original estimates, or was it not?

The Witness: The work—I believe it's been shown here that none of the ballasting work actually commenced until April.

The Court: I see.

The Witness: And that his—now, we are talking about the part—

The Court: I understand.

The Witness: —being on the left bank. So that as regarded the amount of production there

(Testimony of L. W. Huncke.)

would have been no experience up till the time——

The Court: I understand. I just had that one question.

Mr. Keane: If the Court please, may I make a suggestion? I think it might clarify the situation a little bit if Mr. Huncke would tell us just how this contract was to be performed, [333] building of the subgrade, and what came next and what came next and about when it was being done. The sequence of events, I think, have been fragmentary all the way through. That way we can tie what we are talking about into a definite sequence of time just as to what happened.

The Court: If Counsel wants to develop that, he may.

Mr. Ramacciotti: That, I believe, was attempted at the commencement of the testimony of this witness when he went on and on and talked for a considerable time.

Mr. Keane: He had nothing to say about that, Mr. Ramacciotti.

Mr. Ramacciotti: And I made an objection to certain of his remarks because they were not proper. And I think the only possible way of getting at the facts will be by asking him questions and getting answers that are under the Rules of evidence.

The Court: I quite agree.

Mr. Ramacciotti: Therefore, I object to the procedure that has been suggested, if your Honor please.

(Testimony of L. W. Huncke.)

Mr. Haessler: If the Court please, we will withdraw that request and go ahead.

Q. Mr. Huncke, did your general contract call for you to lay track? A. Yes, sir.

Q. This track when laid became the relocated portion of the [334] Southern Pacific, is that correct? A. Yes, sir.

Q. You have testified that the subgrade for this track was prepared by other contractors, the preparation of the subgrade was independent of your contract; is that correct?

A. Not exactly. I said that in general the subgrade was performed under Government contract by other contractors, but in so far as roadway shaping and roadbed topping are concerned or can be considered as a preparation of a subgrade then it was included in our general contract as well as in our subcontract with Curtis.

Q. Was roadbed shaping the first job which would be performed under the contract after you took it over?

A. If required, that would be the first job.

Q. Would roadbed shaping require only part of the subgrade turned over to you? A. Yes, sir.

Q. And on the part where it was required it was performed? Was it performed?

A. It was performed by our subcontractor.

Q. What was the next operation that was performed under your general contract, either by the subcontractor or by others, after the roadbed shaping?

(Testimony of L. W. Huncke.)

A. The next operation was to place the roadbed topping.

Q. What material is used for the roadbed topping? [335]

A. I believe the specifications permitted either the use of river-run gravel or crusher-run stone. It was not a highly selected material.

Q. Did the subcontractor place any of the roadbed topping?

A. He placed all the roadbed topping that was included in our contract, in our general contract.

Q. When was this roadbed topping placed?

A. I can only say generally when it was placed because in my trip to Lookout Point either in August or the 1st of September a portion of it had been placed. And that was one of the things I was complaining about. As to what was placed after my trip to Lookout Point, I don't know.

Q. What is the next step after the placement of the roadbed topping?

A. The next step after the placement of the roadbed topping is to distribute the cross-ties and then the rails and the attachments that permit you to assemble the track itself.

Q. When is the ballast placed on the——

A. The ballast was placed on the completed track.

Q. Well, the ballast was put on after the ties and rails and everything else had been done?

A. After they had been properly hooked up and

(Testimony of L. W. Huncke.)

properly aligned, the ballast is then unloaded and applied to the track.

Q. Is that the last operation under your contract? Except for a variance in the work that is the last operation? [336]

A. Except for various other little work it is the last operation.

Q. Did the amount of ballast required per hundred feet of right-of-way vary substantially on the job?

A. You mean vary as between various locations on the job?

Q. Yes; various locations on the job.

A. I wouldn't be able to say, but I don't think so. I don't know, but I don't think so. [337]

* * * * *

Q. All right. I hand you herewith Defendants' Exhibits 5-A and 5-B. Will you read those, please?

A. This is a paid day letter telegram, Kansas City, Kansas, May 9th, 1952, addressed to Curtis Gravel Company; Spokane, Washington: [342]

"Lookout Point ballast supply exhausted this week. If no other source suggest you contact MKM and local producers for remaining requirements. Advise. William A. Smith Contracting Company, Inc., L. W. Huncke."

Q. Did you receive any reply to that telegram?

A. I don't know.

Mr. Ramacciotti: What's the date of that?

Q. (By Mr. Haessler): What was the date? Will the Bailiff read the date, please?

(Testimony of L. W. Huncke.)

The Witness: May 12th, I think it says.

The Bailiff: May 9th.

Q. (By Mr. Haessler: Will you read the next telegram?

A. It's a paid day letter, Kansas City, Kansas, May 13th, 1952, Curtis Gravel Company; Spokane, Washington:

“Account your failure provide stone ballast Lookout Point relocation conformance terms your sub-contract we have arranged to procure same from commercial sources at your expense. Procurement will commence May Fifteen. Lookout Point Constructors, L. W. Huncke.”

Q. Did you receive any reply to that telegram?

A. Not that I know of. I don't know.

Mr. Haessler: And will you give the witness, please, Plaintiff's Exhibit 4-O. [343]

Q. Will you read that, please?

A. This is a copy of a letter dated at Kansas City May 8th, 1952. Registered mail to Mr. Curtis, Curtis Gravel Company, Box 106, Spokane, Washington:

“Dear Mr. Curtis: In conversation this date with our project manager at the Lookout Point job I was advised of the quantity of ballast which you have manufactured for construction of the relocated tracks which will probably fall short of the requirements by as much as 5,000 yards.

“You will recall in my personal estimates on the quantity of material required there was approximately 64,000 yards. It now appears that sixty-four

(Testimony of L. W. Huncke.)

to sixty-five thousand cubic yards will be required. Both Mr. Thompson and yourself were advised of my personal estimate in the matter as well as being given our theoretical calculations for the quantities required. We, therefore, presume that you have made arrangements either to manufacture the additional requirements or to purchase the materials locally.

“In any event, we desire to be advised of what arrangements you have made to guarantee the amount of material not yet manufactured and in [344] stock pile. Your prompt reply will be appreciated.”

Q. Did you receive any reply to that letter?

A. I don't know.

Q. Where did you get the balance of the ballast required for the job?

A. It was purchased from a commercial source at Springfield, Oregon.

Q. Do you recall the number of yards which was purchased?

A. From Springfield?

Q. Yes.

A. No, I don't.

Mr. Haessler: No further examination. You may cross examine. [345]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Ramacciotti): Now, did you on occasions prior to the filing of the complaint in this court have conversations with Mr. Curtis and with myself and with Mr. Ratcliffe with reference to this matter in litigation? A. Yes, sir.

Q. Did you at any time when those conversa-

(Testimony of L. W. Huncke.)

tions were in progress deny any part or portion of the claim for \$14,582?

A. I don't think I ever was called upon to affirm or deny that. I made many attempts to settle this over the past few years with both yourself, Mr. Ratcliffe and Mr. Curtis. As to [350] a specific sum of money being as to claim denial or affirming of it, I don't recall anything about that.

Q. You don't recall anything about it?

A. I recall that we were offering Mr. Curtis settlements of various sums at various times in which these amounts developed.

Q. Now, to refresh your recollection, may I say to you—let me ask you whether or not you were in Portland on the 15th of November, 1954, and were present in the office of your attorneys in the American Bank Building at about 5:00 o'clock of that day, at which time I came to that office and talked with you?

A. I recall talking to you in this office.

Q. Now, subsequent to that meeting I might say to you, Mr. Huncke, I returned to my office and prepared a complete memo of the conversation thereafter, placing it upon a recorder. Tell me, if you will, whether or not the contents of this memo are correct in this regard. First matter discussed pertained to the \$14,000 claim. As to this item the following statements were made: Lookout Point Constructors do not deny the debt on this item.

A. Do not deny what?

Q. What is that?

A. What is that?

(Testimony of L. W. Huncke.)

Q. Lookout Point Constructors do not deny the debt on this item. Do you recall having stated that you did not deny the [351] debt on this item?

A. I don't wish to be placed in a position of including that as a debt. I do not deny that I offered Mr. Curtis fourteen thousand and substantially more than that.

Q. You are varying from my question, Mr. Huncke.

A. Well, I don't care to answer the question on the basis of a debt.

Q. All right. You do not deny that you were indebted to them at that time by virtue of having received that amount of money from the Corps of Engineers?

Mr. Haessler: If the Court please, I'd like to have that question reread. I don't understand it.

The Court: Read it, please.

(Whereupon Mr. Ramacciotti's last question to the witness was read by the Court Reporter.)

Mr. Haessler: I think the question should be—do you mean does he deny it now, or did he deny that in that conversation?

Mr. Ramacciotti: Well, there is only one fact and that is he either denies it now or then and they are both the same, or they should be.

The Court: Please read the question again.

Mr. Haessler: Please read the question again, what he is being asked to deny. [352]

(Whereupon the question as read in the last

(Testimony of L. W. Huncke.)

parenthetical was again read by the Court Reporter.)

The Witness: I deny I was indebted to him other than for what we had offered to make settlements for.

Q. (By Mr. Ramacciotti): Well, now, the further reference to this claim of four thousand-plus—and I am referring to the memorandum that I have mentioned earlier—appears this language:

“Lookout Point is not disposed to pay any interest on this item, although some \$14,582 has been in the possession of Lookout Point since July of 1953.” Is that a correct statement of what you told me at that time? A. I don’t remember.

Q. You have no recollection of it?

A. I don’t—do not recollect that.

Q. Do you remember discussing interest?

A. I think you brought the subject up, or it was in a complaint, or something. I remember there was a discussion about interest. I believe you had compiled some thirty-odd thousand dollars of indebtedness in which one of the items was interest.

Q. Do you recall having told me the reason why you would not pay interest on the fourteen thousand dollars from the [353] time that you got the money?

A. I can tell you exactly why I wouldn’t be willing to pay interest, and that is because I was ready to settle with Curtis the day that the contract was ended. I have been ready to settle with him many times since. And under those circumstances I felt

(Testimony of L. W. Huncke.)

that I did not owe any interest on any moneys that he might be willing to acquire.

Q. Let me ask whether or not this statement contained in the memorandum is a correct statement of what you told me that night. In view of the fact that Lookout Point Constructors consisted of two separate corporate entities, the moneys collected in July of last year could not be converted into capital for use of said firms without splitting between them of the fund. And since the money belonged to Curtis, it was decided that the same be not divided but same be placed in a commercial account without interest, being merely impounded to await Curtis' decision to settle all claims and take the funds awaiting delivery to him. Is that a correct reflection of what you told me at that time?

A. I don't remember that.

Q. You don't remember it? A. No.

Q. Well, what happened to the money? Was it deposited in a commercial account?

A. I don't know. [354]

Q. Do you remember having discussed that with me?

A. The joint venture was an entity of two corporations and their funds were maintained for a certain period after the contract to clean up indebtedness and, particularly, to settle their dispute with Curtis.

Now, as to whether the funds were kept separately or divided, it wouldn't matter. We had a bond on the job and we were both solvent.

(Testimony of L. W. Huncke.)

Q. But did you not tell me at that time what we are getting at?

A. I don't recall anything about that, Mr. Ramacciotti.

Q. That you didn't split the money because it belonged to Curtis?

A. I don't recall it. It's possible it wasn't split, or it's possible it was split; I do not know.

Q. Is it possible that you told me these things that appear in this memo?

A. Is it possible?

Q. Yes.

A. I would think it would be possible. I don't remember it.

Q. All right. That's all I want on that. Now, Mr. Huncke, will you state, please, whether or not on September 25th, 1952, you as the designated authorized executive of Lookout Point Constructors wrote a letter to the Resident Engineer of the Corps of Engineers of the United States Army with reference to [355] a claim on account the matter of the \$9,871.70 which has been discussed here?

A. I wouldn't remember that.

Q. You don't remember it?

(Whereupon a document was handed to the witness by the Crier.)

Q. By the way, is that dated September 25th?

A. 25th; yes, sir. I wrote this letter.

Mr. Ramacciotti: May I have it back, please?

Q. Then, let me inquire further with reference to this matter and ask whether or not on January

(Testimony of L. W. Huncke.)

19th, 1953, you addressed a second letter to the Corps of Engineers at Portland with regard to same item. May I correct that date? Whether or not Mr. Moore, your office manager in Portland, wrote the letter to the Corps of Engineers with regard to this same item? A. I don't know.

Q. What? A. I presume he did.

Q. Do you know about that?

A. I don't know, Mr. Ramacciotti. It's entirely possible. If that's a copy of it, I am sure he wrote it.

Q. Well, do you know of this subject matter which was included in the letter which is in evidence, Exhibit 2-H—

A. May I look at it?

Q. —to the effect that the claim should be paid by the [356] Corps of Engineers; that is, the nine-thousand-dollar claim, for the reason, among other things, that the stand-by charge for the crusher and equipment of Curtis Gravel at the plant until it was finally determined when—what ballast was actually to be required would run to \$118,380.75? Do you remember that matter?

A. I remember some generalities about that.

Q. Yes. And you used those figures as a means; that is, through Mr. Moore, to convince the Corps of Engineers that they should pay the nine thousand because they avoided the obligation to pay \$118,000 on account stand-by equipment?

A. I don't think we used the figures in that fashion at all.

Q. Well, the exhibit speaks for itself, Mr.

(Testimony of L. W. Huncke.)

Huncke. A. All right.

Q. Now, then, on the 23rd of February do you recall having addressed a letter to the Chief of Engineers of the Corps of Engineers at Washington regarding this matter? Would you like to see the letter? If you do, I will send it up to you. It's Exhibit No. 2-I. And, Likewise, you might look at these two others. That will save time.

(Whereupon the Crier hands the documents to the witness.)

The Witness: I recall writing this. These all have to do with the claim. [357]

Q. That's right. Now, in the letter of February 23rd—which, apparently, carried your signature; isn't that correct? A. Yes.

Q. Let me ask whether or not you made these statements to the Corps of Engineers of the United States Army:

“Ballasting operations did not commence until April, 1952, due to the condition of the completed four and a half miles of railroad subgrade. It is acknowledged that this four and one-half miles of completed subgrade was available for track-laying and ballasting on November 28, 1951.”

Is that a correct statement?

A. I am sure it is.

Q. Was there four and a half miles of track ready for ballast at that time?

A. I don't know. I was not there.

Q. Well, did you say that in the letter?

(Testimony of L. W. Huncke.)

A. If the letter says so, I certainly wrote that letter.

Q. Now, as a matter of fact, you were there sometime in the summer of 1951?

A. That's right.

Q. Isn't it a fact that there were two miles of track ready for ballast in July of 1951?

A. No, I don't think so. [358]

Q. Okeh. Now, if there were—and I think I will establish by your testimony that there was—if there two miles of track ready for ballast in 1951, July, and two more miles or two and a half more miles by November, and had you applied ballast to those four and a half miles, which is more than one-fourth of the 16-mile relocated track, would you have not been able to determine by December of 1951 about what your requirements would be——

A. No, sir.

Q. ——from the experience——

A. No, sir.

Q. ——on account the four and a half miles?

A. No, sir.

Q. You could not? A. No.

Q. Now, the letter of February 23rd—may I ask whether or not you recall having this in mind at the time you wrote this letter of February 23rd:

“I would like to advise you that your statement ‘referring to a statement in letter received by you prior to dismantling your crushing plant on December 22nd, 1951,’ is in error. This crushing plant was in no way dismantled until February 16th, 1952.

(Testimony of L. W. Huncke.)

Although no permission was given to dismantle the crushing [359] plant after February 16th, 1952, the matter was discussed with your Resident Engineer. Inasmuch as the ultimate cost was obviously less, a decision to procure ballast commercially was made. Although there is no record of such approval on this procurement, it was perfectly obvious to all concerned that this procedure should be adopted.”

Was that your reaction and opinion at the time you wrote this letter?

A. I think the discussions referred to were not discussions of mine but discussions of others. And I think they were the discussions of Curtis Gravel Company with the Resident Engineer.

Q. Well, the letter tells who the discussions—

A. Well, I didn't get that out of what you read.

Q. Now, with reference to the letter of March 16th, let me ask whether or not you looked at that letter and it was written by you and the paper that is in evidence is a photostat; isn't that true?

A. I think so.

Q. This language from the letter of the 16th of March:

“Although I have no reason”—referring to yourself— “—have no reason for not having secured your permission to remove this equipment from the job site”—and the letter has to do with the crushing equipment, of course—“at the [360] same time I believe it was self-evident to the Resident Engineer and to us that no one could afford to hold a complete quarrying and crushing plant for an in-

(Testimony of L. W. Huncke.)

definite duration to manufacture an indefinite quantity of material.”

Was that a statement made by you at that time?

A. If it's in that letter, I made it.

Q. Actually, reading on from there:

“Our subcontractor produced a substantial percentage of material over and above the contract requirements. Our calculations indicated that the theoretical quantity of ballast required would not exceed 48,000 yards. The contract quantity was 54,000. I think that was an error. Obviously it included a percentage for compaction and subsistence. We produced, initially, about 60,000 yards, an amount approximately 25 per cent in excess of the theoretical quantity. It is believed that a sound decision was made at the time that the plant was dismantled, and in looking back over the matter I am inclined to believe that we would have followed exactly the same course except that we would have unquestionably presented the matter to you. For this omission I am sorry.”

That was in your mind at the time you wrote this [361] letter?

A. I think it's very clear in the letter that I wrote Curtis Gravel Company that I had no reason to ask them to hold the plant. I stated that quite clearly, that their means of procurement——

Q. You have already answered the question that I have asked you and that is with reference to the contents of the letter I just read to you.

Now, there is another letter that you looked at a

(Testimony of L. W. Huncke.)

moment ago, being Exhibit 2-K, and being a letter photostat dated June 29th, 1953. Did you look it over while you had it in your hands a moment ago?

A. I didn't look at any of them too accurately. But they bear my signature and I wrote them. There is no question about what is in them.

Q. Let me direct your attention to this letter which contains a number of paragraphs. Let me refer to Paragraph C, and I will read from it and ask you whether or not it is written as you had dictated it and as you transmitted it originally:

“Although Contract Item No. 3b ‘ballast material’ provided for an estimate of 56,000 cubic yards of such material, the theoretical quantity of material required for the construction was slightly less than 48,000 cubic yards. [362] It can reasonably be assumed that the Government in preparing the contract bid items allowed for losses which occur in subsistence and compaction of the ballast material in the gross amount of approximately 8,000 yards or 16 per cent. This is not an unusual variation from the theoretical quantity and the actual quantity used in this type of construction work. The contractor actually placed 71,343 cubic yards, which represents a 27.4-per cent increase over the contract quantity, but a 48.5-per cent increase over the theoretical quantity. It is not reasonable to assume that the contractor would expect an overrun in this theoretical quantity of ballast of 48.5 per cent.”

Now, further from that letter, Paragraph D:

“The contractor manufactured and stockpiled

(Testimony of L. W. Huncke.)

48,434 cubic yards of ballast material having the same available for installation on the track in December of 1951. This was an allowance of 21.7 per cent of the possible—for a possible overrun, and the theoretical requirement was 48,000 cubic yards. This was also an allowance of 4.3 per cent over the quantity estimated as being required by the Government.” [363]

Further, with reference to this letter, subparagraph E on Page 2:

“The contractor permitted the subcontractor to dismantle and remove his ballast plant from the site after producing 58,434 cubic yards of material which was in excess of the contract quantity and assumed to be sufficient to perform the work.”

Next, subparagraph F:

“We believe it erroneous to state that the ballast plant was partially dismantled and not operated after December, '51. When 58,434 cubic yards of material was produced, the plant was dismantled for major overhauling and was not—and was at all times until March 6th, 1952, at the site of the work. No part of the plant was removed from the site before February, 1952.”

You were conversant with the true facts at the time you wrote this letter, were you not, Mr. Huncke?

A. The statement you just made was given to me by Curtis Gravel Company and I merely passed it on to the Government.

Q. Didn't you have a superintendent there that made reports to you?

(Testimony of L. W. Huncke.)

A. But that particular——

Q. Can you show any——

Mr. Haessler: I object, your Honor. I think he should [364] be permitted to finish his answer.

Mr. Ramacciotti: I think that's right. I am sorry.

The Witness: I merely stated that the contention of the Government was that the plant had been dismantled in December of 1951. Our superintendent reported that it was removed from the site March 6th. I had not a thing to refute the contention of the Government except by reference to Curtis Gravel Company. They told me that in January they had taken the motors out for overhauling but that their plant, substantially, remained at the site until March 6th.

Q. (By Mr. Ramacciotti): Now, the information contained in this letter, do you attribute all of it to the source that you mentioned, Curtis Gravel, or did it come from your own representative on the job? A. I am talking about this plant.

Q. This one thing.

A. This last thing that you are talking about?

Q. That's all right, then. Did you have any letters from Curtis Gravel advising you with reference to this plant matter, or is that word of mouth?

A. I don't know. I don't remember.

Q. You don't? Now, let me ask you, Mr. Huncke, whether or not—I refer back to the letter of March 16th and particularly this language:

“Actually, our subcontractor produced a [365]

(Testimony of L. W. Huncke.)

substantial percentage of material over and above the contract requirements.”

That is in your letter. That is one signed by you to the Corps of Engineers. What contract requirements were you talking about when you said that Curtis produced an amount over and above the contract requirements?

A. I was talking about the specified quantities in the general contract.

Q. And you wrote this letter in March of '53, after the job was all finished?

A. That's right.

Q. And all extensions of time and such had passed and were gone behind; right?

A. Well, I don't know whether all extensions had been taken care of or not.

Q. Now, let me ask you, Mr. Huncke, whether or not you were present at a hearing before the Claims and Appeals Board of the United States Corps of Engineers, United States Army, on the 10th day of May, 1954, in Portland?

A. I believe I was.

Q. What is that? A. Yes.

Q. Let me ask you, Mr. Huncke, whether or not you recall that a Mr. Comisky, counsel for the Government, in that proceedings made a rather extended statement of what the case and [366] the claim was about? A. I think so.

Q. Would you care to look over the statement of Mr. Comisky, made to the Member of the Board who was there in charge at the time? I would like

(Testimony of L. W. Huncke.)

that you do that. Page 3. It would just entail reading it to yourself; Page 3, 4, 5 and half of 6. [367]

* * * * *

(Discussion held off the record.)

Q. (By Mr. Ramacciotti): May I ask, have you finished that, Mr. Huncke?

A. I don't know how far you want me to read it.

Q. I said the end—to the middle of Page 6.

A. Well, I am just about there.

Q. The end of the remarks of Mr. Comisky.

May I please have it now that he has finished?

Now, Mr. Huncke, you have read to yourself and out loud the remarks of Mr. Comisky starting on Page 3 and extending to the center, approximately, of Page 6 of the transcript, Exhibit 1; correct?

A. Right.

Q. You are nodding your head, and that doesn't get into the record. A. Correct.

Q. Now, after those remarks of Mr. Comisky with reference to the nature of the case, and that is what his remarks had to do with, that is, the nature of the claim; correct? A. That's right.

Q. It is a claim on excess ballast requirements for 9,000-plus?

A. It's a claim on extra cost.

Q. Yes. You were asked by Examiner Buckey of the Board—there was a comment by Examiner Buckey, and then you made [369] this statement, is it not correct, Mr. Huncke:

“Well, the basis of the claim, I think, has been set forth accurately”?

(Testimony of L. W. Huncke.)

Is that correct?

A. I think the basis was there. I don't agree with Mr. Comisky's—all his statements there.

Q. Well, did you say that it was set forth accurately?

A. I think it was set forth accurately.

Mr. Ramacciotti: I am not going through it reading all of this, but the point that I make, if your Honor please, is that this witness, after having heard the remarks of the attorney for the Government, said that the basis of the claim has been set forth accurately by Mr. Comisky.

Q. Now, Mr. Huncke, after the completion date of the original contract, the crushing plant was removed; correct?

A. No, I can't agree with that.

Q. The 16th of February?

A. It was removed after the 16th of February.

Q. That's right. After it was removed, whether with or without your consent and blessing, as some of the letters indicate that you gave,—

A. Yes.

Q. —after it was removed there were further requirements for gravel on this job on the 16 miles, or ballast, rather? A. That's right. [370]

Q. You made known to Curtis Gravel none of these extra demands, did you, extra requirements?

A. You are talking about extras by reason of change orders or such or whether—

Q. For any reason, after the contract proper expired. There were requirements that you did not

(Testimony of L. W. Huncke.)

bring to the attention of Curtis Gravel Company, requirements of ballast?

A. After February 16th—I really don't understand your question.

Q. Well, all right. I'll get to the point a bit more closely. After the plant was dismantled, the railroad,—that is, the Southern Pacific Railroad,—protested about three-quarters of an inch of ballast that they desired added, and that came to 2400-plus yards on the over-all requirements; isn't that true?

A. Now, Mr. Ramacciotti, I'll need to explain a little. I just said, first, that Mr. Comisky made a basis for my claim and I thought the basis was correct. But I do not support him in any of those statements that he has made regarding where this ballast went.

Q. All right. Well, didn't you at one time take issue with this figure, the 3500 extra yards which were required, and state that according to your computation actually 5500 extra on that particular part—

A. What was that part? [371]

Q. —of the job—

A. Well, what was that?

Q. Well, let's get back here. Well, after Curtis had removed or dismantled the Curtis plant, was it decided that three-quarters of an inch average of extra ballast should be placed and was in place along this right-of-way?

A. I have no knowledge of that.

Q. You don't remember?

A. None whatsoever.

(Testimony of L. W. Huncke.)

Q. Do you remember?

A. I contest the point, however.

Q. What is that?

A. I contest that statement by the Government.

Q. Do you remember Mr. Buckey having stated—he was the one in charge of the meeting—as follows:

“You have heard Mr. Drager’s testimony that in spite of this dressing of the grade as it was turned over to the present contractor, that it still hadn’t achieved the final grade in some places?”

“Mr. Comisky: That’s right.

“Examiner Buckey: By about 3,500 yards, as the figures I have figured.

“Mr. Huncke: Fifty-five hundred.

“Mr. Comisky: We dispute on that now. [372]

“Mr. Huncke: I calculated fifty-five.”

Is that correct?

A. I don’t know what you are referring to because the basis the Government was attempting to refute any overrun on this and brought up some ways in which they might account for the differences in this ballast. But we have never agreed to any of them.

Q. And all through those proceedings, as you now, of course, recall, I take it there was a matter of how much ballast was required after the plant was dismantled and there was testimony, principally yours. Without going into the detail here we are getting along pretty late of 5500 extra cubic yards in connection with one requirement, 4200 in

(Testimony of L. W. Huncke.)

connection with another requirement, and another requirement of 680, and another of 560, or a total of in excess of 11,000 cubic yards. From your recollection do you remember that?

A. I absolutely deny that. [373]

* * * * *

Q. (By Mr. Ramacciotti): Mr. Huncke, I observed from the various letters that appear in the Curtis file and in our file that your official capacity for the defendant here was throughout the negotiations and dealings that of authorized executive; is that [387] correct?

A. I believe so. Yes. I had authority to act for both companies.

Q. I didn't hear.

A. I had the authority to act for both companies.

Q. Now, on the matter of this ballast; that's the claim of some nine thousand dollars. May I please see for this question Defendants' Exhibit 4-F? Hr. Huncke, I referred to ballast, and I have before me Defendants' Exhibit 4-F, which was a letter written over your signature to Mr. Thompson of Curtis Gravel Company on December 3rd, 1951. The last two sentences of that letter dealing with the matter of ballast requirements read as follows:

"Under the circumstances it would appear to us that there might be an overrun in the quantity of ballast material required, and this overrun might conceivably approach 10 per cent. I am sorry that we are unable to give you a more definite or accu-

(Testimony of L. W. Huncke.)

rate information, and it is our suggestion that you take off the quantity from the plan and base your production of material on the quantity which you believe to be required.”

Now, as of that date, which was almost two months subsequent to the date set forth in the sub-contract for the [388] stock-piling of the entire 56,000 cubic yards, I take it that you were not able to determine what ballast was required?

A. No, I was not.

Q. At that time—and that was within a couple of weeks, according to the testimony here, prior to the time when the stock-piling was completed—you had no idea as to what would be required?

A. I had an idea about it, but I said there it looked like there would be an overrun.

Q. “Might,” you say?

A. Yes. That’s right.

Q. An overrun might conceivably approach 10 per cent? A. That’s right.

Q. That was what was in your mind at that time?

A. As far as I personally was concerned, that’s correct.

Q. Now, with a 10-per cent overrun that would make the total requirement as you—as per your estimate of December 3rd, 1951, 61,600 cubic yards?

A. (Witness nods head.)

Q. Right?

A. That was approximately my amount.

Q. Fine. Now, then, in connection with that re-

(Testimony of L. W. Huncke.)

quired quantity you, of course, have heard the testimony of Mr. Thompson to the effect that the amount actually produced and put in stock pile approximated 60,000 cubic yards, although there was only loaded [389] in the car somewhat over 58,000; is that correct?

A. Well, I know that he said he stock-piled 60,000 yards.

Q. You have no quarrel with that statement, do you, Mr. Huncke?

A. The only quarrel I would have with that is that we didn't know whether any of the yards would meet the specifications or did we know the quantity.

Q. You didn't endeavor to ascertain the quantity that was in stock pile by measuring?

A. No, we did not.

Q. You did not? A. No. [390]

* * * * *

Q. Now, I think on your direct examination it was your testimony that Mr. Curtis should have known of the ballast need on this 16 miles of track since he did the topping; isn't that true?

Mr. Keane: I wonder, if your Honor please, can the Reporter read that question? [394]

The Court: Yes; please read the question.

(Whereupon Mr. Ramacciotti's last question to the witness was read by the Court Reporter.)

The Witness: I think Curtis was on the ground.

Q. (By Mr. Ramacciotti): Well, now, the question was did you give that testimony some ten days ago at a prior hearing in this case?

(Testimony of L. W. Huncke.)

A. I really don't know whether I said it that way or not. What I had in mind was that Curtis was on the ground and was placing topping on the subgrade. So that he would be familiar with the subgrade.

Q. Well, now, my notes may be in error, but I do have notes to the effect that Curtis should have known as to the requirements of the ballast since he furnished all of the topping.

A. No. No. I did not say all of the topping.

Q. Well, as a matter of fact, to get to the actual fact on that point of topping, he only furnished two miles or a little over two miles of topping on the entire 16-mile project, isn't that correct?

A. No, I don't believe that's correct.

Q. That's not correct? A. No, sir.

Q. Now, had you by October 11th, 1951, determined the amount of ballast required on this job?

A. No, sir.

Q. Did you by that date advise Curtis as to the amount required? A. No, sir.

Q. Did you ever advise Curtis as to the amount required? A. No, sir.

Q. Never did? A. No, sir.

Q. When did you start placing ballast?

A. I believe April 1st or thereabouts.

Q. 1952? A. '52; yes, sir.

Q. What about the matter of the certain two miles of track being available for ballast in July of a prior year?

A. What is it you would like to know about it?

(Testimony of L. W. Huncke.)

Q. What? A. What is the question?

Q. I say, what is the fact as to whether there were two miles of track ready for ballast in July of the year prior? A. That is not a fact.

Q. What is the fact as to whether there were four and a half miles of ballast or approximately that ready for—or track ready for ballast in December of 1951? Yes or No, please.

A. I do not know.

Mr. Haessler: If the Court please, you asked him what is [396] the fact and then you asked him to answer Yes or No. I think that's an inconsistent question.

Q. (By Mr. Ramacciotti): Well, is it true or not, Yes or No?

The Court: The witness said he didn't know.

The Witness: I do not know.

Q. (By Mr. Ramacciotti): Did you have a contract; that is, a subcontract, with Springfield Sand and Gravel Company in connection with this 16 miles of track? A. No, sir.

Q. Did you have a subcontract for ballast on the other side of the river—— A. No, sir.

Q. ——with that firm?

A. No, sir. We had a commercial order.

Q. And did you have just one?

A. We had one commercial order with them for a Part A of the contract, and then we were obliged to go into another order with them for Part B.

Q. Now, let me ask you, Mr. Huncke, whether or not you have, or your firm or any of its representa-

(Testimony of L. W. Huncke.)

tives, to your knowledge, have received a check from the Corps of Engineers in the amount of approximately \$1845 on account adjustment on your claim for extra ballast?

A. We have been offered such a check.

Q. What did that check cover? [397]

A. That check, I believe it was intended to cover the amount which the Government would allow for our ballast claim.

Q. In other words, you have been tendered \$1845 on your claim for ballast, which represented around \$9,000?

A. A little more than that, I believe.

Q. A little more than that? A. Yes.

Q. And you refused it?

A. We have done nothing with it at the moment.

Q. Are you holding the check?

A. I don't know if we are or not. We may be.

Q. You don't know where the check is?

A. Well, I don't know exactly. We may be holding it. We might have sent it back; I am not sure.

Q. That was what was allowed after final hearing in connection with your ballast claim?

A. (Witness nods head.)

Q. Are you still in the process of handling a claim against the Corps of Engineers on account ballast?

A. Well, the claim, as far as the Corps of Engineers is concerned, has ended.

Q. Has what?

A. Has ended. Our prosecution of the claim against them is over with.

(Testimony of L. W. Huncke.)

Q. And you turned, then, the \$1845, either returned the check [398] or not cashed it?

A. That's right.

Q. Now, had you collected that amount of money that should have been moneys of Curtis Gravel Company, isn't that right? Yes or No.

A. I don't believe so.

Q. Whose money would it have been?

A. Lookout Point Constructors'.

Q. Did you ever advise Curtis Gravel of your having received that check for \$1845?

A. No, I don't believe so.

Q. Did you personally ever advise Curtis Gravel that you received a check of \$14,434?

A. I don't believe so.

Q. Now, the reason, as I understand it, Mr. Huncke, that the \$1845 was paid to your firm, or tendered or refused, or whatever the fact is, is that it was a compromise allowance tendered by the Corps for ballast that was required on account new developments which occurred after the dismantling of the plant of Curtis Gravel.

A. I don't know what it was allowed for.

Q. You have sought to find out what it was for?

A. It was their appraisal of our claim.

Q. Don't you know that that is the basis upon which—

A. I don't know what their basis of that money is. It doesn't [399] make sense to me.

Q. You never inquired to find out what the true fact was, did you?

(Testimony of L. W. Huncke.)

A. I reached the limit with the Corps of Engineers.

Mr. Ramacciotti: That's not the question. Would you read the question?

The Witness: Well, then, I didn't inquire further.

Q. What is the fact, Mr. Huncke, as to whether there was any extra ballast used on these 16 miles of track, ballast not contemplated in arriving at the estimated requirement of 56,000?

A. I think the records show that there was some five or six hundred yards of ballast not originally contemplated.

Q. Now, refreshing your recollection, Plaintiffs' Exhibit No. 1 refers to extra ballast used in quantities—may I see that exhibit, please? I don't have the figures here.

How many yards of extra ballast did you say were—

A. About five or six hundred, I believe.

Q. Would the figure 680 cubic yards be the figure you had in mind?

A. That's probably the amount.

Q. What about the 3500 cubic yards that were required?

A. I don't know anything about it.

Q. You were present at the hearing?

A. Yes, sir. [400]

Q. Well, I'll not go into great detail, but can you tell us about the extra twenty-four hundred?

A. I don't know anything about those alleged

(Testimony of L. W. Huncke.)

extras. They are merely contentions of the Corps of Engineers.

Q. What about the 560?

A. I believe the 560 was an established amount to be used for some specific purpose. The 680, whatever it is—500——

Q. Well, do you recall giving any testimony before the Corps of Engineers as to your thought as to what actually was used by way of extra ballast?

A. I don't remember.

Q. You don't recall? A. What is it?

Mr. Haessler: If the Court please, I think this line of questioning is ambiguous and unfair to our client in that I think Counsel must specify by extra ballast whether he means ballast beyond the estimated quantity in the contract or whether he means ballast beyond what we were obligated to furnish under the terms of the contract. I think that's causing confusion to our witness.

The Court: Yes. I can see where it could be confusing.

Q. (By Mr. Ramacciotti): I am referring, Mr. Huncke, to ballast that was not completed at the time of the original contract and that was used——

Mr. Haessler: If the Court please, by "not completed," [401] do you mean not encompassed within the terms of the original contract or not contemplated within the scope of the estimate?

Q. (By Mr. Ramacciotti): Not contemplated as being required?

A. The only amount that I know of is a specific

(Testimony of L. W. Huneke.)

amount of some five or six hundred yards that was added to the contract for a specific purpose. Other than that I think all the ballast used was within the original contract scope.

Q. Well, whatever the amount is—and this record is quite detailed on it and has your testimony in it, which I am not going to indulge in now because of the matter of time—but whatever extra ballast that was not contemplated but was used, let me ask whether or not Curtis Gravel was paid for it or whether they were allowed credit on account your purchases from Springfield Sand and Gravel?

A. I don't know where these extras that you are talking about occurred. It could have occurred out of the 56,000 or 58,000 that Curtis procured for us or they might have procured out of this amount we bought. I don't know where that developed, you see.

Q. You don't know what?

A. I don't know where they developed—this volume of ballast developed.

Q. Now, on September 21st you wrote to Curtis Gravel and stated that within two weeks you would procure a figure as to requirements of ballast. Did you procure a figure in pursuance [402] with that promise made?

A. We made several estimates.

Q. Did you advise Curtis as per the promise in the letter?

A. I don't remember the exact wording of the letter, as to whether it was a promise or an offer. I would like to read the letter.

(Testimony of L. W. Huncke.)

Mr. Ramacciotti: All right. That is exhibit—
Plaintiffs' Exhibit 2-B. May that be presented to
the witness, please?

(Whereupon the document was handed to the
witness by the Crier.)

Mr. Ramacciotti: Read that.

The Witness: Well, I state in here that I am
going to cooperate and help him.

Q. Well, what about the two-weeks matter? Will
you refer to that?

A. There is no commitment here. But I say,
"You will be furnished within two weeks. I will
cooperate and help you all I can."

Q. Did you furnish any figure as to require-
ments within that time? A. No, sir.

Mr. Ramacciotti: May I please see Exhibit 2-F,
Defendants? No. That's Plaintiffs' I am talking
about.

(Whereupon the Crier hands the document
to Mr. Ramacciotti.) [403]

Q. (By Mr. Ramacciotti): Mr. Huncke, as late
as April 14th, 1952, in a letter written by you from
Kansas City to Mr. Thompson of Curtis Gravel
Company which is in evidence, appears this lan-
guage:

"We acknowledge that we intended to advise you
concerning an accurate determination of the amount
of ballast required."

Did you by that date furnish an accurate deter-
mination in accordance with the promise made?

A. No, sir.

(Testimony of L. W. Huncke.)

Q. In that same letter, Mr. Huncke, which is, as I say, in evidence, of April 14th, it appears that you made the suggestion that the Curtis Gravel Company enter into an agreement with the Southern Pacific Company or with the Corps of Engineers for the disposition of any surplus ballast that might be produced; is that correct?

A. That is correct.

Q. Are you acquainted with the fact that the site where the ballast was being procured and the rock crushed was the operation of the Federal Government? A. Yes, sir.

Q. Do you think that Curtis Gravel Company could take Government property and sell it to a railroad or to anyone else?

A. I'd think he could.

Q. You think they could? [404]

A. Yes, sir. I think he could under those circumstances.

Q. Let me ask you this: Assume the production——

A. Not anyone else, but to the Government.

Q. ——of ballast that was actually stock-piled for the purpose of this case which appears to be some 58,000-plus cubic yards and the approximately 12,000 more cubic yards, and let us assume, even more than that, better than, say, seventy-two or three thousand cubic yards, would you or your firms have been able — not able — willing to have paid Curtis Gravel Company for any overrun or over-production?

(Testimony of L. W. Huncke.)

A. We would have paid him under the terms of our subcontract only.

Q. In other words, you would pay only on the basis of what was taken from stock pile?

A. Our subcontract provides that the amount of ballast that we will pay for is the amount determined by the principal.

Q. In other words, what you wanted to buy?

A. Not necessarily. The principal could have bought in a stock pile, I believe. They could have bought it any way they wanted to.

Q. Let me ask whether or not if there had been 5,000 yards of ballast stock-piled that was not required on this job whether your firm was ready and willing to pay for that at the contract price if not used by you?

A. Well, that never occurred to me. [405]

Q. What?

A. The problem has never developed. I mean that's very hypothetical.

Q. Well, maybe it is hypothetical, but this is cross examination. And I will ask whether or not you would have paid Curtis for preparing and stock-piling?

A. We would have paid him under—only under the terms of our subcontract. That's the only way we'd pay him.

Q. In other words, if Curtis Gravel Company had produced more ballast they would have been, you might use the phrase, stuck with it?

A. Oh, I don't think so.

(Testimony of L. W. Huncke.)

Q. If it was more than you wanted to buy?

A. I wouldn't agree with that at all.

Q. But you wouldn't pay for it?

A. We might have paid for it.

Q. Might have? A. Yes. [406]

* * * * *

Q. Just as the stand-by equipment was beyond the scope of the original contract?

A. I don't agree with that at all.

Q. Okeh. Now, at the time that you entered into the original subcontract with Mr. Curtis of Curtis Gravel Company, Mr. Huncke, I think the first discussion about that or the first arrangement before the actual formal subcontract was had verbally about March, is that right, of '51?

A. And possibly even before then.

Q. Then, as I understand, the contract was signed on June 10th of '51?

A. I think it was signed about then. It [412] bears that date, anyway.

Q. Now, on your direct testimony you said that Curtis was furnished a copy of that contract on June 10th when it was signed by both parties.

A. He was furnished a copy of that contract long before June 10th.

Q. Long before. That is, the final contract?

A. Yes, sir.

Q. Final subcontract. Are you sure of that date, that time? A. Quite positive about it.

Mr. Ramacciotti: Would you kindly have that letter marked as an exhibit?

(Testimony of L. W. Huncke.)

The Court: What is the date of the letter, please?

Mr. Ramacciotti: The letter is one dated August 2nd. Isn't that correct?

The Crier: 1951.

Mr. Ramacciotti: 1951.

The Court: Thank you.

Mr. Haessler: Counsel, if you have no objection, may we examine the other letter which you have offered in evidence?

The Court: What is the date of that letter?

Mr. Haessler: The date of this letter, your Honor, is March 29th, 1952.

The Court: Thank you.

(Whereupon a letter dated [413] August 2, 1951, from Lookout Point Constructors to Curtis Gravel Company was thereupon marked for Identification as Plaintiff's Exhibit 21.)

Q. (By Mr. Ramacciotti): Now, Mr. Huncke, you have before you a letter dated August 2nd, 1951, transmitting to Curtis Gravel Company their copy of the agreement of the subcontract under the prime contract here at issue, is that right?

A. That's right.

Q. So that the defendants held up delivery of the contract until August—

A. No.

Q. —as signed? A. No.

Q. That's not true?

A. The contract was presented to Mr. Curtis on or about the 24th day of April for signature. And the contract was then changed and he held the contract for some month or two attempting to get a

(Testimony of L. W. Huncke.)

performance and payment bond and, perhaps, for other reasons that I have no knowledge of.

Q. Well, now, you just testified, though, Mr. Huncke, that the contract copy that belonged to Curtis was delivered to him before June 10th.

A. That's right, April 24th. Not the one that belonged to Curtis, necessarily; the contract. [414]

Q. Well,——

A. I submitted all the contract copies to Mr. Curtis on or about the 24th day of April.

Q. You had a verbal discussion first in Nineteen——

A. No. We had another contract before this contract.

Q. I understand that. But when I am talking about a contract I am talking about the contract that is in issue in this case. Now, you admit that they did not receive the copy of the contract that is at issue in this case until August 2nd.

A. No. They received these contract documents on April 24th.

Q. What about the contract at issue here?

A. The contract at issue was only held by me until I got our performance and payment bond in compliance with the terms of the subcontract agreement.

Q. Mr. Huncke, do you have here available for our inspection any papers that pertain to the purchase or the delivery of the Springfield gravel for ballast?

(Testimony of L. W. Huncke.)

A. I don't know whether we got those papers or not. He can answer that question.

Mr. Ramacciotti: Do you know, Mr. Haessler?

Mr. Haessler: If the Court please, we do have such papers and we intend to offer them in evidence. But we don't have them in the courtroom this morning. [415]

Mr. Ramacciotti: Could you have them here after lunch, please?

Mr. Haessler: We will certainly endeavor to get them.

Mr. Ramacciotti: Will those papers pertain not only to the transaction with the Springfield gravel firm but the railroad charges?

Mr. Haessler: I believe we have papers pertaining to the railroad charges, also.

Mr. Ramacciotti: What about the moving of cars on the relocated main line of the Southern Pacific after Jasper?

The Witness: There is correspondence on that.

The Court: Aren't those amounts covered in the Admitted Statements of Fact?

Mr. Ramacciotti: The amounts are covered, if your Honor please. There is one point I would like to raise with reference to it. We have taken their statement in connection with that, but I am curious as to a certain factor that pertains, that is related.

The Court: All right.

Mr. Haessler: Let me say this: I will produce what records we have. Our records on this Lookout

(Testimony of L. W. Huncke.)

Point job would fill this courtroom. And we have a portion, though, in our law office.

I have looked through some of these. If you want to tell me what it is, I might be able to—— [416]

Mr. Ramacciotti: I would like certain papers and——

Mr. Haessler: Well, I will bring in what papers are available in the office. But I don't want you to feel that we are holding something back because there may be papers that we don't have, of course.

Mr. Ramacciotti: Just before we start this afternoon perhaps I could check them over.

Mr. Haessler: Right.

Mr. Ramacciotti: With the exception of the inspection of these papers, if your Honor please, and, possibly, something more that might develop while Mr. Ratcliffe is searching this file on the date of the contract matter and the date of delivery, we are through with Mr. Huncke.

The Court: You may reopen this afternoon, Redirect?

Mr. Haessler: Yes, your Honor. I don't think we will get too far this morning.

Redirect Examination

Q. (By Mr. Haessler): Mr. Huncke, you have been examined at some length on the circumstances giving rise to the contract. And I am going to ask you to identify certain documents.

First, I would like to have these marked, if you please. This is a letter dated March 12, 1951, from

(Testimony of L. W. Huncke.)

Mr. Huncke to the Curtis Gravel Company. Will you identify that and give [417] it a number, please?

The Clerk: Defendants' Exhibit 21.

(Whereupon a letter dated March 12, 1951, from Mr. Huncke to Curtis Gravel Company was marked for Identification as Defendants' Exhibit 21.)

Mr. Haessler: Here is a letter with attachments from the Curtis Gravel Company to Mr. Huncke dated March 22nd, 1951. That will be No. 22, your Honor.

(Whereupon a letter dated March 22, 1951, from the Curtis Gravel Company to Mr. Huncke was marked for Identification as Defendants' Exhibit 22.)

Mr. Haessler: Here is a letter—telegram dated April 12, 1951, from Mr. Curtis to Mr. Huncke which I ask be marked for Identification as our Exhibit 23.

(Whereupon a telegram dated April 12, 1951, from Mr. Curtis to Mr. Huncke was marked for Identification as Defendants' Exhibit 23.)

Mr. Haessler: Here is a letter dated April 12, 1951, from Mr. Huncke to Curtis Gravel Company which I ask be identified as our Exhibit 24.

(Whereupon a letter dated April 12, 1951, from Mr. Huncke to Curtis Gravel [418] Company was marked for Identification as Defendants' Exhibit 24.)

(Testimony of L. W. Huncke.)

Mr. Haessler: Here is a letter with attachments dated April 15, 1951, from Mr. Curtis to Mr. Huncke, which I ask be identified as our Exhibit 25.

(Whereupon a letter dated April 15, 1951, from Mr. Curtis to Mr. Huncke was marked for Identification as Defendants' Exhibit 25.)

Mr. Haessler: Here is a letter dated April 24, 1951, from Lookout Point Constructors to the Curtis Gravel Company, which I ask be identified as Defendants' Exhibit No. 26.

(Whereupon a letter dated April 24, 1951, from Lookout Point Constructors to Curtis Gravel Company was marked for Identification as Defendants' Exhibit 26.)

Mr. Haessler: Here is a letter dated May 12, 1951, from Mr. Huncke to Curtis Gravel Company which I ask be identified as Defendants' 27.

(Whereupon a letter dated May 12, 1951, from Mr. Huncke to Curtis Gravel Company was marked for Identification as Defendants' Exhibit 27.)

Mr. Ramacciotti: That date, Mr. Haessler? [419]

Mr. Haessler: The date on that is May 12, 1951.

Here is a letter dated May 17, 1951, from Mr. Curtis to Lookout Point Constructors, which I ask be identified as Defendants' Exhibit 28.

(Whereupon a letter dated May 17, 1951, from Mr. Curtis to Lookout Point Constructors was marked for Identification as Defendants' Exhibit 28.)

(Testimony of L. W. Huncke.)

Mr. Haessler: And here is a letter dated May 29, 1951, from Mr. Huncke to Mr. Curtis, which I ask be identified as Defendants' Exhibit No. 29.

(Whereupon a letter dated May 29, 1951, from Mr. Huncke to Mr. Curtis was marked for Identification as Defendants' Exhibit 29.)

Mr. Haessler: Will the Crier please hand this exhibit to the witness?

(Whereupon the Crier does as requested.)

Q. (By Mr. Haessler): I have asked the Bailiff to hand you the document which has been offered—rather, which has been identified as Defendants' Exhibit 21. Will you examine that letter, please, Mr. Huncke?

A. Yes, sir.

Q. Will you read it, please?

A. To the Curtis Gravel Company of Spokane, Washington. It says: [420]

“Gentlemen: You are invited to bid on certain portions of the work under contract Civeng-35-026-51-126 for Relocation Southern Pacific Railway in the vicinity of Lowell, Oregon. The work which we are inviting you to bid on is described in the attached specifications and is the entire work or a part of the work contracted for by us with the Corps of Engineers, Portland District, under the above designated Contract Items 2A, 3A, 2B, 3B, 1C, 2C, 3C and 4C.

“You are invited to quote promptly on this basis, or if you desire an alternate basis which you should describe so that we can appraise your bid.

“Please send bids to us at the Portland office.

(Testimony of L. W. Huncke.)

“Yours very truly, Lookout Point Constructors,
L. W. Huncke.”

Mr. Haessler: Are you willing to stipulate to the introduction of that letter?

Mr. Ramacciotti: I have no objection. It is immaterial.

Mr. Haessler: I'd like to offer that, if you please, Exhibit 21.

The Court: It will be received. [421]

(Whereupon letter dated March 18, 1951, from Lookout Point Constructors to Curtis Gravel Company, previously marked for Identification as Defendants' Exhibit 21-A, was thereupon received in evidence.)

Mr. Haessler: Would you please, Mr. Crier, hand that to the witness?

(Whereupon the document requested was handed to the witness.)

Q. (By Mr. Haessler): Mr. Huncke, the Bailiff has handed you a document which has been identified as Defendants' Exhibit 22. Without reading it—it is lengthy—would you please state—could you summarize or state what the document is?

A. Well, the document is a response to the letter I have just read from Mr. Curtis to Lookout Point covering the items in the contract which we desired the subcontract and are his bids for that work.

Mr. Haessler: Do you have any objection to it?

Mr. Ramacciotti: I have no objection, but I feel it is immaterial.

The Court: It will be received.

(Testimony of L. W. Huncke.)

(Whereupon a letter from Curtis Gravel Company to Mr. L. W. Huncke, dated March 22, 1951, with seven pages [422] attached, previously marked for Identification as Defendants' Exhibit 22, was thereupon received in evidence.)

Mr. Haessler: Next I would like the Crier to hand this to the witness.

Mr. Ramacciotti: What about 23?

Mr. Haessler: Yes. I am going to offer 23, but I want to offer these others first.

Q. Mr. Huncke, you have been offered a document which has been identified as Defendants' Exhibit 24. Will you read it, please, and give the date?

A. The date is April 12, 1951. Addressed to Curtis Gravel Company at Spokane:

"Enclosed herewith is the original and one (1) copy of sub-contract agreement which we propose to enter into with your company for a portion of the work involved in the construction of approximately 16 miles of track on Southern Pacific Company's relocated main line near Lowell, Oregon, under contract between this company and the Government.

"Please carefully read this sub-contract agreement. If the agreement as drawn conforms with your offer and you take no exception thereto, kindly execute both copies and return same promptly to this office. Also, forward to this office a [423] performance and payment bond in the amount set out in the contract. Upon review of the bond and the

(Testimony of L. W. Huncke.)

executed documents, we will, if in order, execute this agreement, returning one copy to your company.

“Commencement of work under Part A, Item 2A, is required at once. Completion of this work is required by May 1, 1951. Your assurance that such work as is required under this item will be performed in its entirety by May 1, 1951, will be appreciated. Yours very truly, Lookout Point Constructors, by L. W. Huncke, Authorized Executive.”

Mr. Haessler: Do you have any objection to that?

Mr. Ramacciotti: No.

Mr. Haessler: We would like to have that—we hereby offer and would like to have that marked as Defendants' Exhibit 24. The one in the witness' hand is Exhibit 24.

(Whereupon a letter dated April 12, 1951, from Lookout Point Constructors to Curtis Gravel Company, previously marked for Identification as Defendants' Exhibit 24, was thereupon received in evidence.)

Mr. Haessler: Now, if you will give that [424] to the witness, Mr. Crier, please.

(Whereupon the Crier handed a document to the witness.)

The Witness: Thank you.

Q. (By Mr. Haessler): You have handed a document which has been identified as Defendants'

(Testimony of L. W. Huncke.)

Exhibit 25. Without reading the document and attachments, would you state what it is, please?

A. Well, the document is addressed to me at Kansas City. It's signed by Mr. G. Curtis, dated the 15th of April, 1951. It's referring to the Government contract at Lowell. It confirms a telephone conversation which Mr. Curtis and I had on that date. In this letter it takes exception to several items and conditions of the subcontract proposal which we had mailed to Mr. Curtis; particularly, as to the time limit of Part A and as to our failure to incorporate unit prices under Part C in the contract documents.

It adds at the end, "With the two copies of Amended Contract to be returned to us for execution we would appreciate two additional copies for job use."

Mr. Haessler: I would like to offer that as our Exhibit 25, Counsel.

Mr. Ramacciotti: No objection.

The Court: It will be received. [425]

(Whereupon a letter dated April 15, 1951, from M. G. Curtis to L. W. Huncke, previously marked for Identification as Defendants' Exhibit 25, was thereupon received in evidence.)

* * * * *

Q. (By Mr. Haessler): Mr. Huncke, I am handing you herewith a document that has been identified as Defendant's Exhibit 26. [430] It's a very short letter. Will you read it, please?

(Testimony of L. W. Huncke.)

A. To the Curtis Gravel Company at Spokane, Washington:

“Gentlemen: We enclose herewith original and one copy of Contract Agreement for work to be performed on the relocation of the Southern Pacific near Lowell, Oregon.

“The changes requested by you have been made on this Agreement, and I am sure you will find it in order. If so, please sign both Agreements, and return them to this office for Mr. Huncke’s signature. One copy will then be returned to you for your file.

“Yours very truly, Lookout Point Constructors, by J. F. McDowell.”

Q. What was the date of that letter, again?

A. April 24th.

Mr. Haessler: Thank you. Do you have any objection to its admission, Counsel?

Mr. Ramacciotti: No. And I might say in order to save time that we will stipulate that your No. 27, 28, 29, may be received without objection.

Mr. Haessler: All right.

The Court: They will be received. [431]

* * * * *

Q. (By Mr. Haessler): Now, Mr. Huncke, you testified on cross examination that you sent the contracts to Mr. Curtis in April and they were returned? A. Yes.

Q. And that you then made changes in accordance with requests which are set forth in one of these exhibits and then returned the contracts back

(Testimony of L. W. Huncke.)

to Mr. Curtis along with the letter of transmittal and Exhibit 26? A. Yes.

Q. Do you know whether or not there were any further changes [434] in the terms of the subcontract from the language set forth in the document you returned to him in April and the document which was ultimately signed by Mr. Curtis in August?

A. There were no changes in the contract agreement as submitted to him on the 24th of April.

Q. All right. I now ask you to read a very brief letter, Exhibit 27, which I am handing up to the Crier—through the Crier. Read it aloud, if you would, please.

A. Dated May 12th, 1951, to the Curtis Gravel Company of Spokane, Washington:

“Some time ago we submitted to you subcontract forms for work on Lookout Point Dam Relocation. At the same time we requested that you execute these agreements if you found same to be in order and return together with Performance and Payment Bonds to this office.

“To date these agreements and bonds have not been received. Will you kindly forward promptly.

“Yours very truly, Lookout Point Constructors, by L. W. Huncke.”

Q. I am now going to ask you to just read the last paragraph of Exhibit 28, which I am handing up to you, and then I will ask you a question on that. Read that aloud, also.

A. This is a letter dated May 17th, 1951, from

(Testimony of L. W. Huncke.)

Curtis Gravel [435] Company to Lookout Point Constructors. The last paragraph states:

“In regard to Performance and Payment Bonds, we are not in a position at this time to forward this to you. We have just very recently changed our bonding company and they now request that we furnish them with financial statement to date. Further, our accountant and office manager, Mr. Farber suddenly left our employ two weeks ago, and it will require at least two weeks to bring our books up to the current date. We therefore request that you allow us this amount of time in which to get the Performance and Payment Bonds to you. We will do everything possible in order to speed this matter along.

“Very truly yours, Curtis Gravel Company,
M. G. Curtis, General Manager.”

Q. Was your company ready and willing and able to execute the subcontract at any time in the latter part of April or May? A. Yes, sir.

Q. Do you know of any reason which delayed the execution of the contractor other than the subcontractor's inability to get a performance bond?

A. I know of no reason for the delay. [436]

Q. All right. You were asked this morning on the question of whether or not your organization had received a check from the Army Engineers in connection with a ballast claim. Do you know whether in fact you ever received such a check?

A. I have checked since leaving the courtroom

(Testimony of L. W. Huncke.)

this morning with our office in Kansas City, and I find that we were never sent a check.

Mr. Ramacciotti: Which check is that?

Mr. Haessler: That relates to the \$1800 in connection with the——

Mr. Ramacciotti: The \$1800.

Q. (By Mr. Haessler): You testified this morning in response to a question on cross examination that the amount of the ballast you would purchase from Mr. Curtis from stock pile would be an amount determined by the principal. Whom did you mean by the word "principal"?

A. The United States Government, Corps of Engineers.

Q. Then the determination as to the ballast requirements would not be made by your company but would be made by the Government; is that correct?

A. Yes.

Q. You were asked on cross examination this morning whether you ever advised Curtis Gravel Company of the exact amount of ballast which would be required to complete the job. Is it not the fact that you sent them telegrams and also at the [437] time their stock pile ran out advising them that additional gravel—ballast would be required?

A. Yes, sir.

Q. Did you ever receive any reply to those requests? A. No, sir.

Q. You were asked on cross examination last week by Mr. Ramacciotti to answer some rather lengthy hypothetical questions based on notes which

(Testimony of L. W. Huncke.)

he talked of an alleged compromise meeting in which you allegedly agreed to turn over \$14,000 by way of compromise and settlement to the plaintiffs. I ask you whether your understanding of that meeting was that you would turn it over unilaterally or that there were conditions under which that transfer was being made?

A. There were conditions attached to the transfer.

Q. What were those conditions, please?

A. The conditions were that we would receive a release and indemnification.

Mr. Ramacciotti: I am sorry; I didn't catch that answer.

The Witness: That we would receive a release and indemnification.

Mr. Haessler: What do you mean by an "indemnification"?

A. I mean that should the funds which we were paid by the Government in regard to any work performed by us for Curtis be not substantiated by the Corps of Engineers or by the general accounting office, that Curtis would indemnify us [438] accordingly.

Q. Was there a possibility at that time that this \$14,000 might be — let me rephrase the question, please. Was there a possibility at that time that the \$59,000 embodied in that Change Order 23 which includes the \$14,000-odd claimed by the plaintiff might be withdrawn from you in all or in part?

A. Well, any money that we received under the

(Testimony of L. W. Huncke.)

contract would be subject to audit by the General Accounting Office and we would not have a clearance on any funds received under the contract until such time as there was a clearance.

Q. Have you received such clearance to date?

A. Our contract is not closed.

Q. I take it your answer is No? A. No.

Q. Then there is still a question as to whether or not you will, in fact, receive any sums under that change order or other change orders?

A. There is a possibility that the audit may change the amount that we are paid under the contract.

Q. Do you know whether or not the Curtis Gravel Company in fact sold some ballast which they had manufactured from the Government stock pile to private sources?

A. I believe they did.

Q. Were those sales made at your direction?

A. No. [439]

Q. Now, it has been the contention of plaintiffs that you handled, you processed the claims which included this \$14,000 item for stand-by rental on their behalf; is that the fact?

A. No, it is not a fact.

Q. Did you incur any expense in prosecuting these claims?

A. We incurred substantial expense in prosecuting all claims on the Lookout Point job.

Q. Did the Curtis people ever offer to pay you

(Testimony of L. W. Huncke.)

for the expenses involved in prosecuting any of these claims? A. No.

Q. Did they ever give you an understanding that you might be—let me rephrase that question. Did they ever give you an understanding that you could deduct a considerable expense of processing these claims inasmuch as you were allegedly processing them on their behalf? A. No.

Q. Now, you were asked about the presentation of various claims this morning, Mr. Huncke. Did you personally process claims handled on the Lookout Point job? A. No, I did not.

Q. Who handled the processing of such claims?

A. Our office in Portland. Lookout Point office handled those. [440]

* * * * *

Recross Examination

Q. (By Mr. Ramacciotti): Did you ever at any time, Mr. Huncke, call upon the plaintiff to give you any indemnification on other extra items that were paid to the plaintiff by you and received by you from the Corps of Engineers?

A. I never settled my contract with Mr. Curtis so that I would put the entire thing in one indemnification.

Q. But you paid the money over on the other excess without [442] calling upon——

A. Partially. I paid only partial payment to Mr. Curtis.

Q. What is that?

(Testimony of L. W. Huncke.)

A. I paid Mr. Curtis only partial payment as the progress progressed.

Q. On the extras?

A. I didn't have any extras. On the contract that I had with Curtis I paid progressively partial payment estimates.

Q. How much do you owe Curtis now?

A. I believe that as of now we owe him nothing.

Q. Now, in your direct testimony, Mr. Huncke, I believe on your direct examination on the 1st— or cross examination on the 1st of the month; that is, February 1st, you stated in substance that you, on the occasion when you talked with me at the office of your attorney, offered the \$14,000 item and considerable more in settlement. Did you at that time consider that you owed \$14,000 and considerably more to Curtis Gravel?

A. No. I was attempting to settle with Curtis Gravel Company.

Q. Did you make any mention at that time with reference to the matter of your being indemnified or taking some kind of an indemnifying release?

A. Oh, yes. Always.

Q. You did?

A. Always a release with an indemnification.

Q. Well, naturally in case of settlement. But I am talking about an indemnifying agreement.

A. Any release that I would draw in this instance would contain an indemnifying agreement.

Q. Did you ever bill Curtis Gravel Company

(Testimony of L. W. Huncke.)

for the expense incurred in processing this claim that we were just talking about, the \$14,000?

A. No, sir.

Q. So that if you never billed Curtis in connection with this expense there was no occasion for him offering you repayment because he had no possible means of knowing what expense might have been incurred; isn't that true?

A. I don't understand the question.

Mr. Ramacciotti: Read the question, please.

(Whereupon Mr. Ramacciotti's last question to the witness was read by the Court Reporter.)

The Witness: I just wouldn't know how to answer that question.

Q. (By Mr. Ramacciotti): What?

A. I wouldn't know how to answer that question.

Q. In other words, you have no answer?

A. I have no answer.

Q. Now, your handling of these claims; that is, such as the one for \$14,000, against the Corps of Engineers was [444] routed through your Portland office?

A. All the claims were handled in Portland.

Q. And that office was in charge of a Mr. Moore?

A. That's right.

Q. That office was regularly conducted in Portland for the handling of matters relative to dealings with the Corps of Engineers?

(Testimony of L. W. Huncke.)

A. It was set up to handle the Lookout Point job and its existence beyond the completion date was for the processing of claims.

Q. Now, you have maintained here that there has been expense in connection with the processing of this claim of \$14,000. Isn't it a fact that Curtis Gravel furnished two separate statements as to the basis of that claim?

A. They furnished substantial information.

Q. And that information was simply turned over to the Corps of Engineers?

A. No, sir; I don't believe that's true.

Q. What is that?

A. I don't believe that's true.

Q. And you were paid exactly on the basis of the claim as presented by Curtis Gravel to Lookout Point Constructors?

A. I don't think that's true. [445]

* * * * *

[Endorsed]: Filed November 18, 1957.

[Endorsed]: No. 15828. United States Court of Appeals for the Ninth Circuit. Wm. A. Smith Contracting Co., Inc., a corporation, and Wm. A. Smith Contracting Company of California, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, Appellants, vs. Marland Curtis, Lyman Curtis, Glen C. Curtis and Rachel Curtis, a co-partnership, doing business as Curtis Gravel Company, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 16, 1957.

Docketed: December 23, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15828

WM. A. SMITH CONTRACTING CO., INC., of
Missouri, a corporation, and WM. A. SMITH
CONTRACTING COMPANY OF CALIFOR-
NIA, a corporation, doing business as a joint
venture under the name of LOOKOUT POINT
CONSTRUCTORS, Appellants,

vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN
C. CURTIS, and RACHEL CURTIS, a co-
partnership, doing business as CURTIS
GRAVEL COMPANY, Appellees.

ADOPTION OF RECORD ON APPEAL AND
STATEMENT OF POINTS ON APPEAL

Appellants hereby adopt the "Designation of
Contents of Record on Appeal" and "Statement of
Points on Appeal" filed in the United States Dis-
trict Court for the District of Oregon in the within
cause.

KEANE AND HAESSLER,
/s/ GORDON H. KEANE,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 23, 1957. Paul P.
O'Brien, Clerk.

